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IN THE

Supreme Court of the United States

October Term, 1962

No. [redacted] 37
CIVIL

GENE DURFEE AND LAURA DURFEE,
Petitioners,

vs.

JULIA E. DUKE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF PETITIONERS

HAROLD W. KAUFFMAN,
730 Farm Credit Building
Omaha 2, Nebraska
ALFRED A. FIEDLER,
300 Keeline Building
Omaha 2, Nebraska
AUGUST ROSS,
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Attorneys for Petitioners.

Cockle Printing Company—Law Briefs—Omaha, Nebr.

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IN THE

Supreme Court of the United States

October Term, 1962

No. 593

CIVIL

GENE DURFEE AND LAURA DURFEE,

Petitioners,

vs.

JULIA E. DUKE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 308 F. 2d 209, and copy thereof appears in the printed record (R. 52). The opinion of the United States District Court in this case is not reported but a copy thereof entitled "Memorandum Opinion, Findings of Fact, and Conclusions of Law" is likewise included in the printed record (R. 30-43). Also necessary to a full understanding of this case is the opin-

ion of the Supreme Court of Nebraska in *Durfee v. Keiffer*, 1959, 168 Neb. 272, 95 N. W. 2d 618 (R. 17).

GROUNDS OF JURISDICTION

The judgment before this Court for review is that of the United States Court of Appeals for the Eighth Circuit entered September 18, 1962 (R. 73). This judgment reversed the decree of the United States District Court for the Western District of Missouri, St. Joseph Division (R. 44).

A petition for rehearing and a request for hearing en banc were duly filed and were overruled by the Court of Appeals on October 11, 1962 (R. 74). The petition for certiorari was filed November 14, 1962 and was granted January 7, 1963 (R. 76).

The statutory provision conferring on this Court jurisdiction to review the judgment in question by certiorari is 28 U. S. C. § 1254 (1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

This case involves the following constitutional and statutory provisions:

(1) U. S. Constitution, Article IV, Section 1 (U. S. C. A. Constitution, Article IV, Section 1):

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such

Acts, Records and Proceedings shall be proved, and the Effect thereof."

(2) Acts June 25, 1948, c. 646, 62 Stat. 947, 28 U. S. C. A., Section 1738:

"The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affxiing the seal of such State, Territory or Possession thereto.

"The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

"Such Acts, records and judicial proceedings or copies thereof so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

QUESTIONS PRESENTED FOR REVIEW

A quiet title action was brought in the District Court of Richardson County, Nebraska and the question of that Court's jurisdiction of the subject matter was fully litigated in the trial court. The question was dependent solely upon resolution of a fact issue based upon conflicting evidence concerning whether the Missouri River changed its course by avulsion or by accretion at the point in question, and hence whether the river-bottom land involved was in Nebraska or Missouri. On an appeal taken by the losing claimant subject-matter

jurisdiction was again litigated on trial de novo in the Supreme Court of Nebraska. No review of the Nebraska Supreme Court's judgment was sought in this Court.

The following questions are presented for this Court's review:

1. **Under the foregoing circumstances, is the Nebraska Supreme Court's judgment res judicata in the United States District Court for the District of Missouri in a subsequent title action involving the same land and brought in Missouri by the losing claimant in the Nebraska action against the prevailing claimants therein?**

   [The Court of Appeals in reversing the decree of the United States District Court held that the doctrine of res judicata did not preclude an independent determination by the second forum (United States District Court sitting in Missouri) of the question of jurisdiction of the first (Nebraska Supreme Court) over the subject matter, even though the question had been actually litigated in the trial court in Nebraska and again in the Supreme Court of Nebraska in the first case and the jurisdiction of the Supreme Court of Nebraska had been invoked by the losing claimant who brought the subsequent Missouri action.]

2. **Under the foregoing circumstances, is the Nebraska Supreme Court's judgment entitled to full faith and credit in the United States District Court for the District of Missouri in a subsequent title action involving the same land and brought in Missouri by the losing claimant in the Nebraska action against the prevailing claimants therein?**

   [The Court of Appeals, in reversing the decree of the United States District Court, held categorically that a determination of a court that it has jurisdiction of the person of defendant or of

the subject matter of a suit is not entitled to full faith and credit in a subsequent action brought in a court of another state even though jurisdictional questions involved were actually litigated in the first forum. Hence, the Court of Appeals held that the judgment of the Nebraska Supreme Court was not entitled to full faith and credit in this litigation.]

STATEMENT OF THE CASE

In November, 1956, Gene and Laura Durfee (hereinafter described as petitioners) filed in the District Court of Richardson County, Nebraska, an action against Julia E. Duke (hereinafter described as respondent) and her tenants to quiet title to certain land located in the Missouri River bottoms, which land was once an island in the river and is now located a short distance east and south of Rulo, Nebraska, and west and south of Fortesque, Missouri (R. 9, 52).

Patents covering the land were issued by the General Land Office of the United States in 1860 and were later filed with the Register of Deeds of Richardson County, Nebraska. The petitioners claimed the land under a Richardson County, Nebraska Sheriff's tax foreclosure sale and the respondent claimed the land through a Holt County, Missouri swamp land patent (R. 53).

The middle of the main channel in the Missouri River forms the boundary between Missouri and Nebraska (R. 53) and the determination of the controversy, both on the question of jurisdiction of subject matter (whether the land was in Nebraska or Missouri) and the question of the merits (ownership of the land) depended solely upon

an issue of fact, that is, whether the river changed its course by accretion or avulsion. The parties were not and are not in disagreement as to the law concerning the effect of accretion and avulsion on mid-channel state boundaries (see footnote 6, R. 68). At this point it suffices to say that if in fact the channel change involved resulted from avulsion the land remained Nebraska land and title was in the petitioners; and if from accretion, it became Missouri land and title was in respondent.

The District Court of Richardson County found the issues in favor of petitioners and quieted title in them (R. 15, 16). *Respondent* then appealed to the Supreme Court of Nebraska where, on trial de novo on the record made in the District Court, the Supreme Court of Nebraska affirmed the judgment (R. 17-29). See *Durfee v. Keiffer*, 168 Neb. 272, 95 N. W. 2d 618.

The Nebraska Supreme Court specifically found that the doctrine of avulsion applied, that the land was Nebraska land, that the court had jurisdiction of the subject matter of the action and that title to the land was in the petitioners (R. 23).

The respondent did not seek review by this court of the judgment of the Nebraska Supreme Court. Rather, the respondent, a Missouri resident, on May 23, 1959—less than two months after the decision of the Nebraska Supreme Court—filed the instant title action in the Circuit Court of Holt County, Missouri praying for a decree that fee simple title to the land was in her and that the petitioners be forever enjoined and restrained from asserting or claiming any right, title or interest in or to any of the property (R. 3, 4).

The case was removed to the United States District Court for the Western District of Missouri, St. Joseph Division, by petitioners, who are residents of Nebraska (R. 1). The Court found that it had jurisdiction by virtue of the diversity of citizenship of the parties and the amount in controversy which exceeded in value the sum of $10,000.00 exclusive of interest and costs (R. 30).

The Court, the Honorable R. M. Duncan, sitting, held that the judgment of the Nebraska Supreme Court was res judicata and that the issues involved therein could not be relitigated by the same parties in Missouri. The Court, however, said that in his opinion the decision of the Nebraska Supreme Court was erroneous and that if the question had been presented to him initially he would have found for respondent (R. 40-42).

The respondent appealed from the judgment of the United States District Court to the United States Court of Appeals for the Eighth Circuit (R. 50) and that Court, sitting in division, held that the full faith and credit clause as implemented by congressional action did not apply to the case because jurisdiction of subject matter was involved. The court further held that the doctrine of res judicata did not apply (R. 52-72).

As to res judicata, the Court of Appeals apparently thought, inasmuch as jurisdiction of the subject matter was involved, the subject matter was land, and the question was whether this border-line river land was located in one or another of two different states, that Missouri courts were not bound by the decision of the Nebraska Supreme Court. The Court of Appeals pointed out the five factors stated in the American Law Institute's Re-

statement of Judgments and Restatement of Conflicts to be important to a decision on whether there was an overriding policy which would defeat the application of the doctrine of res judicata and held that the Restatement correctly stated the law as this court has developed it. The Court then found four of the five factors in favor of the petitioners but held that considerations of policy nevertheless required a decision that the United States District Court in Missouri could make an independent determination concerning the question of jurisdiction of the subject matter.

SUMMARY OF ARGUMENT

I.

Where a jurisdictional question is actually litigated and determined it may not later be redetermined in a subsequent action between the same parties, and the first judgment is res judicata on such jurisdictional issues. This rule is applicable to subject-matter jurisdictional issues as well as to issues involving jurisdiction of the person.

Authorities on Jurisdiction of the Person

Chicago Life Insurance Co. v. Cherry, 1917, 244 U. S. 25, 61 L. ed. 966, 37 S. Ct. 492.

Baldwin v. Iowa State Traveling Men's Association, 1931, 283 U. S. 522, 75 L. ed. 1244, 51 S. Ct. 517.

Authorities on Jurisdiction of the Subject Matter

Forsyth v. Hammond, 1897, 166 U. S. 506, 41 L. ed. 1095, 17 S. Ct. 665.

Stoll v. Gottlieb, 1938, 305 U. S. 165, 83 L. ed. 104, 59 S. Ct. 134.

Treinies v. Sunshine Mining Co., 1939, 308 U. S. 66, 84 L. ed. 85, 60 S. Ct. 44.

Jackson v. Irving Trust Co., 1941, 311 U. S. 494, 85 L. ed. 297, 61 S. Ct. 326.

Chicot Co. Drainage District v. Baxter State Bank, 1940, 308 U. S. 371, 84 L. ed. 329, 60 S. Ct. 317.

II.

Where a subject matter jurisdictional issue has been fully litigated in a court in which the losing litigant sought relief, the judgment is res judicata and is subject only to direct attack. The losing litigant having chosen the forum to decide the matter may not collaterally attack its judgment in a subsequent action between the same parties.

Forsyth v. Hammond, 1897, 166 U. S. 506, 41 L. ed. 1095, 17 S. Ct. 665.

See also: *Chicago Life Insurance Co. v. Cherry*, 1917, 244 U. S. 25, 61 L. ed. 966, 37 S. Ct. 492.

III.

The cases relied upon by the Court of Appeals in its decision presently reviewed, in which this Court declared an exception and held that res judicata did not apply to jurisdiction of the subject matter in the particular case, are distinguishable from the instant case. Generally speaking they involve questions of governmental policy. They do not involve questions of fact between private litigants actually litigated by them and determined in the first action

See:

Valley v. Northern Fire & Marine Insurance Co., 1920, 254 U. S. 348, 65 L. ed. 297, 41 S. Ct. 116.

Grubb v. Public Utilities Commission, 1930, 281 U. S. 470, 74 L. ed. 972, 50 S. Ct. 374.

United States v. United States Fidelity & Guaranty Co., 1940, 309 U. S. 506, 84 L. ed. 894, 60 S. Ct. 653.

IV.

Tested by the pronouncements found in the American Law Institute's Restatement of the Law of Judgments, Section 10, and Conflicts of Law (1948 Supp.), Section 451 (2), the judgment of the Nebraska court in *Durfee v. Keiffer*, 168 Neb. 272, 95 N. W. 2d 618, is res judicata as to matters actually litigated in the Nebraska court including the issue of subject matter jurisdiction, and that judgment is not subject to attack in this action subsequently brought in Missouri.

Restatement, Judgments, § 10.

Restatement, Conflicts of Law (1948 Supp.), § 451 (2).

V.

Neither of the sovereign states of Nebraska and Missouri is bound by the decision in this case and there is no overriding policy involving a state's sovereignty that authorizes refusal to apply the doctrine of res judicata herein.

United States v. Lee, 1882, 106 U. S. 196, 27 L. ed. 171, 1 S. Ct. 240.

Land v. Dollar, 1947, 330 U. S. 731, 91 L. ed. 1209, 67 S. Ct. 1009.

Williams v. North Carolina, 1945, 325 U. S. 226, 89 L. ed. 1577, 65 S. Ct. 1092.

U. S. Constitution, Article I, Section 10.

U. S. Constitution, Article III, Section 2.

VI.

The doctrine of full faith and credit, like that of res judicata, applies to jurisdictional questions actually litigated in the prior action and applies as well to questions of jurisdiction of the subject matter as to questions of jurisdiction of the person.

Chicago Life Insurance Co. v. Cherry, 1917, 244 U. S. 25, 61 L. ed. 966, 37 S. Ct. 492.

Davis v. Davis, 1938, 305 U. S. 32, 83 L. ed. 26, 59 S. Ct. 3.

Williams v. North Carolina, 1945, 325 U. S. 226, 89 L. ed. 1577, 65 S. Ct. 1092.

Sherrer v. Sherrer, 1948, 334 U. S. 343, 92 L. ed. 1429, 68 S. Ct. 1087.

VII.

The cases relied upon by the Court of Appeals in holding that the full faith and credit clause does not preclude a second forum's redetermination of questions of the first forum's personal or subject matter jurisdiction do not involve situations where the jurisdictional matters had been actually litigated by the parties in the first action, and do not preclude the application of the full faith and credit doctrine to such jurisdictional issues.

See:

Thompson v. Whitman, 1874, 85 U. S. (18 Wall.) 457, 21 L. ed. 897.

Grover & Baker Sewing Machine Co. v. Radcliffe, 1890, 137 U. S. 287, 34 L. ed. 670, 11 S. Ct. 92.

Adam v. Saenger, 1938, 303 U. S. 59, 82 L. ed. 649, 58 S. Ct. 454.

Milliken v. Meyer, 1940, 311 U. S. 457, 85 L. ed. 278, 61 S. Ct. 339.

Western Union Telegraph Co. v. Pennsylvania, 1961, 368 U. S. 71, 7 L. ed. 2d 139, 82 S. Ct. 199.

VIII.

A quiet title action was brought in the District Court of Richardson County, Nebraska and the question of that court's jurisdiction of the subject matter was fully litigated in the trial court. The question was dependent solely upon resolution of a fact issue based upon conflicting evidence concerning whether the Missouri River changed its course by avulsion or by accretion at the point in question, and hence whether the river-bottom land involved was located in Nebraska or Missouri. On appeal taken by the losing claimant subject-matter jurisdiction was again litigated on trial de novo in the Supreme Court of Nebraska. No review of the Nebraska Supreme Court's judgment was sought in this Court. Under the above circumstances, the Nebraska Supreme Court's judgment is res judicata in this subsequent title action involving the same land and brought in Missouri by the losing claimant in the Nebraska action against the prevailing claimants therein, and the Nebraska judgment is entitled to full faith and credit in the Missouri action.

[See authorities cited under other paragraphs in this summary.]

ARGUMENT

Prefatory Statement

As disclosed by the record in this case, including the various opinions of the courts below, the crux of the controversy between these same parties in the Nebraska litigation, as respects subject-matter jurisdiction, was whether the main channel of the Missouri River at the point in question shifted by reason of accretion or avulsion. If it shifted by accretion the land in question became Missouri land; if it shifted by reason of avulsion it remained in Nebraska where admittedly it was located originally.

The District Court of Richardson County, Nebraska and the Supreme Court of Nebraska on trial de novo specifically found, on the facts presented by each side in the district court, that the land remained in Nebraska and that Nebraska had jurisdiction of the subject matter of the action. No effort was made by respondent to obtain review by this Court of the Nebraska Supreme Court's judgment.

The sole question presented on certiorari is whether the determination of the Nebraska Supreme Court on the question of subject-matter jurisdiction is conclusive under the principles of res judicata and full faith and credit.

While the Court of Appeals treated full faith and credit and res judicata as entirely separate issues and disposed first of the question of full faith and credit (though in a somewhat summary manner), we recognize that the two questions are interwoven and we feel that res judicata should be considered first. If the Nebraska

judgment is res judicata, we submit that it necessarily follows that such judgment is entitled to full faith and credit in the Missouri courts, both state and federal. Hence we shall herein discuss first the issue of res judicata, then proceed to the constitutional and statutory requirements of full faith.

Res Judicata

On the issue of res judicata the Court of Appeals recognized the rule that ordinarily if a jurisdictional question is determined between the parties in the first suit it may not later be redetermined and that the first judgment is res judicata on such jurisdictional issues. As to jurisdiction of the person the Court of Appeals suggests no exceptions to this rule but as to subject-matter jurisdiction the court noted what it felt to be exceptions based upon special considerations of policy and the court ultimately concluded that the instant case presented a situation calling for the recognition of an exception. In this determination we respectfully submit that the Court of Appeals failed to view the case in the correct perspective and fell into error requiring reversal of its judgment.

We shall not extensively review the cases involving the applicability of the res judicata doctrine to issues of jurisdiction of the person. Respondent herein fully submitted herself to the jurisdiction of the Nebraska courts and recognized that jurisdiction, and there appears to be no dispute that such issues once actually litigated fall within the protection of res judicata. This rule is sustained by many cases including *Chicago Life Insurance*

Co. v. Cherry, 1917, 244 U. S. 25, 61 L. ed. 966, 37 S. Ct. 492, and *Baldwin v. Iowa State Traveling Men's Association*, 1931, 283 U. S. 522, 75 L. ed. 1244, 51 S. Ct. 517. We submit that the rule applied in such cases is no less pertinent in principle to subject-matter jurisdictional issues than to those of jurisdiction of the person, and that the reasons for the rule are the same in either instance. Recognition of this is reflected in the numerous references by this Court to personal jurisdiction cases (especially to *Baldwin v. Iowa State Traveling Men's Association*, supra, and *Chicago Life Insurance Co. v. Cherry*, supra) in decisions involving the applicability of the full faith and credit and res judicata doctrines to subject matter issues.

We turn to an examination of the cases involving subject-matter jurisdiction. A landmark case and one peculiarly apposite, in point of fact, is *Forsyth v. Hammond*, 1897, 166 U. S. 506, 41 L. ed. 1095, 17 S. Ct. 665. The Forsyth case is referred to in the opinion of the Court of Appeals but the court declined to apply its holding to this case, although it recognized conflict between the decision herein and that in Forsyth by attempting to explain "any apparent out-of-jointedness" of the Forsyth case (R. 71, 308 F. 2d at page 220).

In Forsyth, respondent Caroline M. Forsyth sought by injunction in the federal court to forbid the City of Hammond, Indiana from collecting taxes on certain land annexed to the city by an earlier state court decree. The city contended that the earlier decree was res judicata and decisive in the injunction case and the respondent contended that it was void because the enlargement of a city was a matter of legislative rather than judicial cog-

nizance. This Court upheld the contention of the city and pointed out that the respondent had taken an appeal to the Supreme Court of Indiana from the earlier decree of the trial court against her in the annexation proceedings and had on that appeal attacked the validity of the decree on the ground of lack of jurisdiction of the subject matter. Thus, at page 517 of 166 U. S., pages 1099 and 1100 of 41 L. ed., this Court said:

> "* * * If action by the state tribunals stopped with the decree of the trial court, it might be said that the plaintiff did not voluntarily seek that forum. She was brought in by appropriate process, and compelled to there litigate the question. But after an adverse decree she insisted that it was not only erroneous but void, and voluntarily commenced an action in the supreme court of the state to have that claim established. She invoked the jurisdiction of that court. She summoned the city of Hammond into that forum and there c h a l l e n g e d the decree of the circuit court, challenged it for error and also for lack of jurisdiction. The questions both of error and of jurisdiction were certainly judicial in their nature and questions within the undoubted cognizance of the supreme court. She voluntarily sought its judgment. Can she, after its decision, be heard in any other tribunal to collaterally deny the validity thereof? Does not the principle of res judicata apply in all its force? Having litigated a question in one competent tribunal and been defeated, can she litigate the same question in another tribunal, acting independently, and having no appellate jurisdiction? The question is not whether the judgment of the supreme court would be conclusive as to the question involved in another action between other parties, but whether it is not binding between the same parties in that or any other forum."

In the Forsyth case as here, real property as subject-

matter jurisdiction was involved. There, as here, the one subsequently attacking the prior decree voluntarily sought the judgment of the appellate tribunal in the first case. The instant case is even stronger for application of res judicata for the reason that, unlike the situation in Forsyth, this second action is identical to the prior one, that is, both are title actions, the second having been brought to relitigate in another forum the same matter litigated in the first with the former defendant as the plaintiff in the subsequent action.

In *Stoll v. Gottlieb*, 1938, 305 U. S. 165, 83 L. ed. 104, 59 S. Ct. 134, this Court reviewed and reversed a judgment of the Supreme Court of Illinois which denied effect to a plea of res judicata arising from orders of an Illinois United States District Court entered in a bankruptcy proceeding. The original orders had been entered in a hearing at which the respondent Gottlieb, though notified, failed to appear. However, after the institution of the state court action respondent filed a petition in the bankruptcy court to vacate and modify the prior orders in bankruptcy on the ground that the United States District Court did not have power or jurisdiction to cancel a certain guaranty which was involved in the proceedings. An order was entered denying this petition and no appeal was taken. This Court held that regardless of whether the power of the bankruptcy court to deal with the particular subject was strictly jurisdictional or was quasi-jurisdictional the matter having been litigated in the bankruptcy court, that court's order was res judicata of its jurisdiction to cancel the guaranty. In its opinion this Court said at pages 172, 173 of 305 U. S., page 109 of 83 L. ed.:

"When an erroneous judgment, whether from the court of first instance or from the court of final resort, is pleaded in another court or another jurisdiction the question is whether the former judgment is res judicata. After a federal court has decided the question of the jurisdiction over the parties as a contested issue, the court in which the plea of res judicata is made has not the power to inquire again into that jurisdictional fact. We see no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation. In this case the order upon the petition to vacate the confirmation settled the contest over jurisdiction.

"Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retires the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first.

"That a former judgment in a state court is conclusive between the parties and their privies in a federal court when entered upon an actually contested issue as to the jurisdiction of the court over the subject matter of the litigation, has been determined by this Court in Forsyth v. Hammond. [166 U.S. 506, 41 L. ed. 1095, 17 S. Ct. 665.] * * * "

In *Treinies v. Sunshine Mining Co.*, 1939, 308 U.S. 66, 84 L. ed. 85, 60 S. Ct. 44, this Court applied res judicata to a question of jurisdiction of the subject-matter

which had previously been litigated and in so doing made no distinction between a case involving subject-matter jurisdiction and a case involving jurisdiction of the person. In fact, the Court in Treinies cited in support of its decision *Baldwin v. Iowa State Traveling Men's Association*, supra.

Treinies v. Sunshine Mining Co., supra, was an interpleader action by Sunshine, a Washington corporation, brought in the federal court in Idaho against petitioner Evelyn H. Treinies and other Washington citizens, claimants to Sunshine stock and accrued dividends, and adverse claimants including respondent Katherine Mason who were Idaho citizens. The interpleader action was brought because of the existence of inconsistent judgments concerning ownership of Sunshine stock. The Superior Court of Spokane County, Washington, in administering an estate had adjudged that the stock was the property of the assignor of petitioner Evelyn H. Treinies and the District Court of Shoshone County, Idaho, had adjudged that the same property belonged to respondent Katherine Mason.

It appeared that in 1935, a Washington superior court in probate proceedings awarded the property to the petitioner's assignor, after the Supreme Court of Washington had refused to grant a writ of prohibition against the exercise of jurisdiction by the superior court. Other proceedings involving ownership of the same property had previously been instituted by respondents in Idaho (in August, 1934) and in 1936 following an appeal by petitioner to the Supreme Court of Idaho, the district court of Idaho on new findings of fact and conclusions of law held that the stock and dividends belonged to respondent

Mason. No appeal was taken from the final decree of the Idaho district court on its new findings of fact and conclusions of law following remitter from the Supreme Court of Idaho.

In the opinion in the Treinies case this Court at page 78 of 308 U. S., page 93 of 84 L. ed., had this to say:

> "The Court of Appeals correctly determined that the issue of jurisdiction vel non of the Washington court could not be relitigated in this interpleader. As the Idaho District Court was a court of general jurisdiction, its conclusions are unassailable collaterally except for fraud or lack of jurisdiction. The holding by the Idaho court of no jurisdiction in Washington necessarily determined the question raised here as to the Idaho jurisdiction against Miss Treinies' contention. She is bound by that judgment.
>
> "The power of the Idaho court to examine into the jurisdiction of the Washington court is beyond question. Even where the decision against the validity of the original judgment is erroneous, it is a valid exercise of judicial power by the second court.
>
> "One trial of an issue is enough. 'The principles of res judicata apply to questions of jurisdiction as well as to other issues', as well to jurisdiction of the subject matter as of the parties."

Jackson v. Irving Trust Co., 1941, 311 U. S. 494, 85 L. ed. 297, 61 S. Ct. 326, applies the res judicata doctrine in all its force to a subject matter jurisdictional question as against a contention that such question was not actually litigated in the first instance. It appears that in a suit brought in 1927 in the District Court of the United States for the Southern District of New York under the Trading With The Enemy Act, a decree was entered in December, 1929, directing payment to the plaintiff of a stated amount

out of the property of a German corporation which had been seized by the Alien Property Custodian. There was no appeal and the amount awarded was paid. In 1938 the United States moved to set aside the decree contending that the court had been without jurisdiction. The district court granted the motion and the Court of Appeals reversed and reinstated the original decree.

At the original trial a fact issue was presented by the pleadings and proof regarding whether the beneficial owner of the debt was an "enemy" within the Trading With The Enemy Act and therefore not entitled to sue under the act, and such issue was decided against the government's contentions. This Court affirmed the judgment of the Court of Appeals, holding that when the dismissal of the suit was asked by counsel for the government on the ground that the beneficial owner was an enemy under the act the issues thus raised were the same as those which pertain to the jurisdictional question of the right to sue under the act, that regardless of how the issues were labeled the court was authorized to determine them, and that whether the particular issue was actually litigated was immaterial in view of the necessary conclusion that there was full opportunity to litigate it and that it was adjudicated by the decree.

In *Chicot Co. Drainage District v. Baxter State Bank*, 1940, 308 U. S. 371, 84 L. ed. 329, 60 S. Ct. 317, this Court extended the protection of res judicata to a decree entered in a proceeding instituted by a drainage district under an act providing for "Municipal Debt Readjustment" and refused to permit a subsequent attack on subject-matter jurisdiction, even though the issue was not actually pre-

sented in the first suit. The attack on the decree was based on lack of jurisdiction of the subject matter because subsequent to its entry the act upon which the proceedings were based was held by this Court in another case to be unconstitutional. It is pointed out in the opinion that while the statute was not attacked as unconstitutional in the original proceedings for readjustment of indebtedness, the parties were before the Court and could have raised the constitutional question and had it determined. This Court at page 377 of 308 U. S., page 334 of 84 L. ed., said:

> "The Court has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against an attack, while open to direct review, is res judicata in a collateral action",

citing *Stoll v. Gottlieb*, supra.

There are three cases decided by this Court which the Court of Appeals seemed to rely upon in holding that the facts herein require recognition of an exception to the general rule and that the district court erred in applying the res judicata doctrine. They are: *Vallely v. Northern Fire & Marine Insurance Co.*, 1920, 254 U. S. 348, 65 L. ed. 297, 41 S. Ct. 116; *Grubb v. Public Utilities Comm.*, 1930, 281 U. S. 470, 74 L. ed. 972, 50 S. Ct. 374; and *United States v. United States Fidelity & Guaranty Co.*, 1940, 309 U. S. 506, 84 L. ed. 894, 60 S. Ct. 653.

In *Vallely v. Northern Fire & Marine Insurance Co.*, supra, the insurance company was adjudicated an involuntary bankrupt on a creditor's petition. While the company was served with process it defaulted and an order of adjudication was rendered from which no appeal was

taken. After appeal time had expired, the company filed a motion to vacate the adjudication on the ground that the court was without jurisdiction because as an insurance corporation it was specifically exempted by the bankruptcy act from adjudication in bankruptcy. The motion was sustained and the creditor's petition was dismissed. The trustee filed a petition in the Court of Appeals to revise the order of the district court in a matter of law and the case was certified to this Court for instructions. This Court permitted the attack for lack of jurisdiction pointing out that the bankruptcy act specifically exempted insurance companies from its provisions, that there was no bankruptcy statute applicable to them and that jurisdiction did not depend upon the resolution of any questions of fact.

In the Vallely case, supra, this Court distinguishes *First National Bank v. Klug*, 1902, 186 U. S. 202, 46 L. ed. 1127, 22 S. Ct. 899, where subject matter jurisdiction depended upon a question of fact as to whether the alleged bankrupt was "engaged chiefly in farming". In that situation this Court had held that the District Court in determining that the alleged bankrupt, Klug, could not be adjudged a bankrupt, had jurisdiction to make the determination and that its jurisdiction over the subject matter was not and could not be questioned. In the course of the opinion in the Vallely case this Court mentions on numerous occasions the fact that a default was involved and Vallely is distinguished in *Stoll v. Gottlieb*, supra, on that basis, 305 U. S. 175, 176, 83 L. ed. 110, 111. Also Vallely involved governmental policy, not simply a fact question between private litigants.

Grubb v. Public Utilities Comm., 1930, 281 U. S. 470, 74 L. ed. 972, 50 S. Ct. 374, was an appeal from a decree of the United States District Court for the Southern District of Ohio dismissing a bill to restrain the enforcement of an order of the Ohio Public Utilities Commission prohibiting the operation of a portion of a bus route for which leave had been sought. It appeared that after the commission denied a rehearing appellant obtained review of the commission's order by the Supreme Court of Ohio in a proceeding to which the commission was a party defendant. The Ohio Supreme Court affirmed the commission's order and after the expiration of the time allowed to apply for review in this Court, defendants in the suit in the United States District Court, by leave of that court, interposed answers setting up the judgment as a bar to further prosecution of the suit. The district court sustained the plea and dismissed the bill.

In the Grubb case this Court held that the appellant could raise the question of jurisdiction of the subject matter even though at the outset he treated that jurisdiction as subsisting and invoked its exercise. However, this Court also held that the state court had jurisdiction and decided the appeal against the appellant.

The Grubb case, supra, did not involve a question of jurisdiction of the subject matter which had been actually litigated between the parties. Rather, it involved an application of the rule that jurisdiction of the subject matter may not be conferred by consent of the parties—the very antithesis of jurisdiction based upon a judgment of a court following an actual litigation of the issue by the parties involved.

United States v. United States Fidelity & Guaranty Co., 1940, 209 U. S. 506, 84 L. ed. 894, 60 S. Ct. 653, is another case which did not involve an actual litigation of the jurisdictional issues in the first court. It too involved a question of governmental policy.

The government, on behalf of certain Indian nations filed a claim against a coal company in a receivership proceeding in the Western District of Missouri for royalties due under certain leases which had been assigned to the company. The company denied that royalties were owing and claimed certain credits against the nations. By court order reorganization of the company under section 77b of the Bankruptcy Act was instituted and the trustee took possession from the receivers. In the reorganization proceedings the claim of the nations was allowed for $2,000.00 and the debtor's cross-claim was allowed for $11,060.90 and the court decreed a balance of $9,060.90 in favor of the debtor to be "collected in the manner provided by law." No review of this judgment of the Missouri District Court was sought.

Subsequently the United States on its behalf and on behalf of the Indian nations filed a suit in the Eastern District of Oklahoma against the guaranty company as surety on the royalty bond for the same royalties involved in the Missouri proceedings. After entry of the judgment of the Missouri court the guaranty company pleaded that judgment as a bar to recovery by the United States. The trustee and another corporation which had taken over certain assets of the coal company intervened and pleaded the Missouri judgment as determinative. The district court concluded that the Missouri judgment barred

the claim against the sureties and entitled the interveners to judgment against the Indian nations in the amount of the balance found by the Missouri court. The judgment was affirmed by the Court of Appeals.

This Court reversed the judgment of the Court of Appeals, holding that there was no stautory authority granting jurisdiction to the Missouri court to adjudicate a cross-claim against the United States and the Indian nations in tutelage, and that the immunity could not be waived by officials.

As previously indicated, *United States v. United States Fidelity & Guaranty Co.*, supra, did not involve litigation of the question of subject matter jurisdiction in the first court. It involved a question of governmental immunity which could not be waived by governmental officials by failure to object to jurisdiction of the Missouri district court over the cross-claim.

After reviewing the opinions of this Court in the cases we have discussed, supra, the Court of Appeals turned to pronouncements found in the American Law Institute's Restatement of the Law of Judgments, Section 10, and Conflicts of Law (1948 Supp.), Section 451 (2), found that these pronouncements represented the law as this Court has developed it to date, and held that its duty was to apply that law to the instant facts.

Of course it is for this Court itself to say whether the Restatement correctly reflects its views, but for present purposes we may assume that it does. We submit that the conclusion finally reached by the Court of Ap-

peals (that res judicata does not apply here) is no more supported by the Restatement than by Supreme Court decisions.

The texts of Restatement, Judgments, Section 10, and of Restatement, Conflicts of Law (1948 Supp.), Section 451 (2) are identical in language:

> "Where a court has jurisdiction over the parties and determines that it has jurisdiction over the subject matter, the parties cannot collaterally attack the judgment on the ground that the court did not have jurisdiction over the subject matter, unless the policy underlying the doctrine of res judicata is outweighed by the policy against permitting the court to act beyond its jurisdiction. Among the factors appropriate to be considered in determining that collateral attack should be permitted are that
>
> (a) the lack of jurisdiction over the subject matter was clear;
>
> (b) the determination as to jurisdiction depended upon a question of law rather than of fact;
>
> (c) the court was one of limited and not of general jurisdiction;
>
> (d) the question of jurisdiction was not actually litigated;
>
> (e) the policy against the court's acting beyond its jurisdiction is strong."

Prior to our independent examination of the instant case in the light of the views announced in the Restatement, we direct the Court's attention to a matter of importance in that examination.

The Court of Appeals found the first four of the five factors mentioned in the Restatement in favor of the pe-

titioners; then, although seeming to come to the brink of a holding that res judicata should apply, the court found a "policy" which it held to take precedence over that doctrine. It appears to the petitioners that this finding is based upon a misconception of what the Restatement actually says and that in effect the court below parted company with the Restatement.

The Restatement says that if the court has jurisdiction of the parties and determines that it has jurisdiction of the subject matter the parties cannot collaterally attack the judgment for lack of subject matter jurisdiction *unless* the policy underlying the res judicata rule is outweighed by a policy against permitting the court to act beyond its jurisdiction. Then the Restatement lists matters which it says are among the factors to be considered in determining whether the collateral attack should be permitted. These are five in number. The first four are directed to the question whether in the particular case *there is a policy* opposed to the policy underlying the doctrine of res judicata. The fifth factor addresses itself to degree—that is the strength of the policy found on examination of the case in the light of the first four factors listed, as opposed to the policy encompassed by the res judicata doctrine.

The Court of Appeals, having found the first four factors in favor of petitioners, seems to have treated the remaining factor, that is "(e) The policy against the court's acting beyond its jurisdiction is strong", separately and as if it constituted an independent ground for collateral attack, rather than a statement of the degree

of policy the existence of which has previously been determined by reference to other factors.

In the factors suggested by the Restatement are found ample guideposts for determination of the instant case. We proceed to a discussion of this controversy tested by such factors.

Supposed Lack of Jurisdiction Not Clear (Factor (a))

The Court of Appeals recognized that "The Nebraska courts' lack of jurisdiction is not particularly clear." We suggest that this is indeed an understatement. Any lack of jurisdiction of the Nebraska courts would necessarily be based upon an independent determination of fact that the Missouri River changed course as a result of accretion instead of avulsion as determined in the prior Nebraska action. In holding that any such jurisdictional defect is "not particularly clear" the court below recognized that the evidence regarding the channel change was conflicting and that if there were a contrary decision in the Missouri federal court its subject-matter jurisdiction would be *no more clear*.

Aside from other consideration, it is well settled that if a judgment on its face appears to be a record of a court of general jurisdiction, jurisdiction over the cause as well as over the parties is to be presumed unless disproved by extrinsic evidence or by the record itself. *Adam v. Saenger*, 1938, 303 U. S. 59, 62, 82 L. ed. 649, 651, 652, 58 S. Ct. 454; *Milliken v. Meyer*, 1940, 311 U. S. 457, 462, 85 L. ed. 278, 282, 61 S. Ct. 339. We respectfully submit that the subject-matter jurisdiction of the Nebraska courts was in no sense disproved.

Jurisdictional Determination Depended on Fact Issue Actually Litigated in Court of General Jurisdiction (Factors (b), (c), and (d))

Factors (b), (c), and (d) suggested by the Restatement were each determined by the Court of Appeals favorably to the position of the petitioners. We discuss these factors together.

In the first place, the District Court of Richardson County, Nebraska is a court of general and not merely limited jurisdiction (Const. Neb. Art. V, Secs. 1, 9) and its judgment was subject to review de novo in the Supreme Court of Nebraska (Const. Neb. Art. I, Sec. 24, Art. V, Secs. 1, 2; R. R. S. Neb. 1943, §§ 25-1911, 25-1925).

Secondly, the determination as to the jurisdictional issue herein depended not upon a question of law but upon a question of fact, to wit, whether the Missouri River channel changed as a result of avulsion or accretion.

On the question of actual litigation of the jurisdictional issue, the record discloses that the issue of subject matter jurisdiction was fully litigated in the Nebraska courts between the petitioners and the respondent. In this connection, we direct attention to two matters which give special significance to this factor in the case at bar.

First, the litigation of the issue of subject matter jurisdiction involved the very crux of the case on the merits as well as on the right of the Nebraska courts to hear and decide the cause. Jurisdiction of the subject matter was specifically put in issue in the Nebraska case by respondent at the very first opportunity to do so

(R. 13) and in addition, the identical issue of fact was also determinative of title to the disputed land. As stated by the Court of Appeals (R. 68) " • • • The jurisdictional inquiry necessarily coincides with the merits • • • ."

Voluminous evidence was received on this purely factual issue and the Nebraska courts were called upon to delve into this evidence, resolve the conflicts in the testimony, and decide whether the Missouri River channel change resulted from avulsion or accretion. This the Nebraska courts did and there is no reason to believe that Missouri courts could come to a more accurate and correct conclusion from this evidence than that reached in Nebraska.

Secondly, the jurisdiction of the Supreme Court of Nebraska *was invoked by respondent herself*, which brings this case directly within the holding in *Forsyth v. Hammond*, supra (166 U. S. 506, 41 L. ed. 1095, 17 S. Ct. 665). In Forsyth, which involved land as subject matter, this Court held that where the losing litigant in the trial court in the first case voluntarily took an appeal, thereby invoking the jurisdiction of the State Supreme Court, she was concluded by its decision and under the doctrine of res judicata she could not later, and in another tribunal collaterally attack the Supreme Court's judgment on the ground of lack of jurisdiction of the subject matter. See quotation from the Forsyth case, supra, page 16.

The reasoning underlying this Court's decision in Forsyth has particular force here, for respondent in appealing to the Supreme Court of Nebraska not only invoked that court's jurisdiction but she thereby sought and obtained a decision de novo on the very question she now

seeks to relitigate in Missouri. Under R. R. S. Neb. 1943, § 25-1925, in all appeals from the district court to the Supreme Court of Nebraska in equity suits, the Supreme Court has the mandatory duty to try the fact issues de novo on the evidence preserved in the Bill of Exceptions (in Nebraska this includes a transcript of the evidence) and to reach an independent conclusion on fact questions regardless of the conclusions reached in the district court or the fact that there may be some evidence to support them. This rule controls in actions to quiet title, *Elrich v. Ostwald*, 154 Neb. 8, 46 N. W. 2d 686; *Evers v. Evers*, 146 Neb. 104, 18 N. W. 2d 673; and was applied by the Nebraska Supreme Court (R. 18). See *Durfee v. Keiffer*, at page 622 of 95 N. W. 2d.

There Is No Strong Policy Opposing Application of Res Judicata Doctrine (Factor (e))

Regardless of the manner in which the question of "'policy" is approached, the circumstances of this case calling for the application of the principles of res judicata and full faith and credit far outweigh any opposing considerations. If approached in the light of the factors specifically set out in the Restatement, what has been said herein is sufficient. This case, tested by the first four factors mentioned therein, discloses no opposing policy, so the fifth factor regarding the strength of such a policy becomes moot.

On the other hand, even assuming, arguendo, that the Nebraska courts may have been in error in their decisions that the channel change was caused by avulsion there would still remain the question of weighing one policy against the other, that is the policy of conclusiveness of

the prior court determinations based upon actual litigation of fact issues as opposed to a policy against a court's supposedly acting beyond its jurisdiction.

The Court of Appeals found that there was a strong policy against precluding a court of an adjoining state from making an independent determination of the situs of borderline land which has previously been determined in the courts of the first state, though the determination is made in private litigation and cannot bind either of the two states themselves.

In this connection it is clear that neither Nebraska nor Missouri will be bound by the decision in this case. See *United States v. Lee*, 1882, 106 U. S. 196, 27 L. ed. 171, 1 S. Ct. 240; *Land v. Dollar*, 1947, 330 U. S. 731, 739, 91 L. ed. 1209, 1216, 67 S. Ct. 1009; *Williams v. North Carolina*, 1945, 325 U. S. 226, 230, 89 L. ed. 1577, 1582, 65 S. Ct. 1092. The two states must settle any boundary dispute they may have by compact approved by Congress (Constitution Article I, Sec. 10) or by litigation initiated in this Court (Constitution Article III, Sec. 2). However, the Court of Appeals concluded that a state's sovereignty, the validity of its land titles, and the power to tax might "indirectly" be affected by private litigation such as this (R. 71). So the court concluded that as a matter of policy where land is concerned the court of a second state should have the opportunity to satisfy itself of the first court's subject-matter jurisdiction, regardless of other considerations. The court said (R. 71):

> "After careful consideration we conclude that, for a land case such as this, a policy of careful recognition of jurisdictional limitations and of permitting inquiry into the basis of subject-matter jurisdic-

tion outweighs any conflicting res judicata principle."

The above conclusion is difficult to understand, especially in view of the court's determination that "the Nebraska courts' lack of jurisdiction is not particularly clear" (R. 68). This observation was obviously based upon the fact that jurisdiction depended upon the resolution of a fact question concerning the cause of the change in the channel of the Missouri River.

This case does not involve an attempt by a state to assume jurisdiction over land clearly outside its boundaries. Neither Nebraska nor Missouri would attempt arbitrarily to usurp the jurisdiction of the other. The core of the controversy here is the location of the land in one state or the other which depends entirely upon the question of fact previously determined in the Nebraska litigation.

This brings us to a further consideration. If the Nebraska Supreme Court's judgment is not conclusive, neither would a subsequent Missouri judgment settle the matter. Such a judgment, holding Missouri to be the situs of the land, would have no more sanctity and no more conclusiveness than the prior Nebraska decision holding Nebraska to be the situs. If the Nebraska judgment is not entitled to full faith and credit, neither would a subsequent conflicting Missouri judgment be so entitled. The two decisions, while settling nothing between the states of Nebraska and Missouri, would merely prolong the private litigation between the petitioners and respondent which even now has been in court for more than six years. On the other hand, a holding that the matter once determined by the Supreme Court of Ne-

braska at the instance of the respondent herself is conclusive as between the parties and that the Nebraska judgment is entitled to full faith and credit would terminate this litigation.

On page 10 of respondent's brief opposing the granting of certiorari it is contended that if the opinion of the Court of Appeals is allowed to stand it will be "the second and binding opinion and it will finally and conclusively determine the issues." We respectfully disagree.

The Court of Appeals held that subject-matter jurisdiction may be redetermined even though the question has been fully litigated. The court further held that the Nebraska Supreme Court judgment is not entitled to full faith and credit. In these circumstances either (1) subsequent judgment of the United States Court in Missouri holding that the Nebraska court did not have jurisdiction would likewise be subject to a later attack on the ground of lack of subject-matter jurisdiction or (2) the Court of Appeals is in error in holding that subject-matter jurisdiction previously litigated in Nebraska may now be relitigated. The respondent in arguing that the decision of the Court of Appeals herein would determine the issue necessarily admits that the Court of Appeals' decision is incorrect.

Neither *Treinies v. Sunshine Mining Co.*, 308 U. S. 66, 84 L. ed. 85, 60 S. Ct. 44, nor *United States v.* 171.74 *acres of land, etc.*, D. C. Neb., 206 F. Supp. 322, relied on by respondent support a view that subject matter jurisdiction having once been litigated may be relitigated in another court one more time but not a third or fourth time. Rather they support the rule that subject-matter

jurisdiction having been fully litigated between the parties *may not be relitigated at all.* The ultimate conclusion in Treinies that the Idaho court's determination on subject-matter jurisdiction was res judicata was necessarily premised on the fact that the issue once determined could not be relitigated. As previously pointed out at page 20, supra, this Court held in the Treinies case that the Idaho judgment was res judicata even though the Idaho court may have *erroneously* failed to give full faith and credit to the Washington judgment, and the Court pointed out that if the Idaho court erred the right to review that error was by appeal in the Idaho case.

The petitioners herein are attacking the decision of the Court of Appeals directly and not collaterally and we respectfully submit that the holding of that court that the issue of subject-matter jurisdiction may be relitigated is in direct conflict with *Treinies v. Sunshine Mining Co.*, supra, and *United States v.* 171.74 *acres of land, etc.*, supra.[1]

Full Faith and Credit

In this title action, based as it is on the identical matter involved in the previous Nebraska suit to quiet title with each party reversed as to position as plaintiff or defendant, the issues of full faith and credit and res judicata necessarily overlap to a great extent, so that authorities applicable to one issue are often applicable likewise to the other. We now discuss the full faith and credit issue and insofar as possible we shall avoid repe-

1. United States v. 171.74 acres of land, etc., was affirmed by the Court of Appeals on June 3, 1963. See Schroeder v. 171.74 acres of land, more or less, 318 F. 2d 311.

tition of authorities previously discussed under the res judicata issue.

The Court of Appeals made short shrift of the petitioners' contention that the judgment of the Nebraska Supreme Court in *Durfee v. Keiffer* (R. 19), 1959, 168 Neb. 272, 95 N. W. 2d 618, is entitled to full faith and credit in this case. The court held categorically that the full faith and credit clause does not preclude a second forum's inquiry into questions of the first forum's personal or subject-matter jurisdiction. But an examination of the cases cited to support the rule announced discloses that in none of them was the jurisdictional question actually litigated in the first court. Furthermore, the rule announced by this Court in those cases specifically limits the application of the rule permitting a second court to make an independent determination of the first court's jurisdiction to cases in which such jurisdiction *has not been litigated* by the parties who subsequently seek to attack it. We proceed to discuss the decisions relied on by the Court of Appeals.

Thompson v. Whitman, 1874, 85 U. S. (18 Wall.) 457, 21 L. ed. 897, held that the record of a judgment rendered in one state is not conclusive as to the facts necessary to give that court jurisdiction and may be inquired into in a subsequent suit in the courts of another state notwithstanding such record. Thus, this court at page 469 of 85 U. S. (18 Wall.), page 902 of 21 L. ed. concluded:

> "On the whole, we think it clear that the jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state, notwithstanding the provision of the 4th Article of the Constitution and the

law of 1790, and notwithstanding the averments contained in the record of the judgment itself."

The Thompson case does not reach the problem presented where not only does the record *recite* necessary jurisdictional facts but also affirmatively discloses that the jurisdictional matters *were actually litigated by the parties*. Decisions on that matter were to come later.

The problem presently considered is likewise not within the scope of *Grover & Baker Sewing Machine Co. v. Radcliffe*, 1890, 137 U.S. 287, 34 L. ed. 670, 11 S. Ct. 92. There the holding is that a personal judgment is without validity if rendered by default in a state court action on a money demand against a nonresident of the state, upon whom no personal service of process within the state was had. In Grover, the action was upon a judgment of a sister state and the defendant was permitted to set up as a defense want of jurisdiction in that he was not an inhabitant of the state rendering the judgment, had not been served with process, and did not enter his appearance. Quite obviously the question of jurisdiction had not been litigated between the parties in the original action.

Adam v. Saenger, 1938, 303 U.S. 59, 82 L. ed. 649, 58 S. Ct. 454, was a case which in fact specifically recognized the legal principle applicable in the case at bar.

The Adam case involved a Texas action upon a California judgment taken by default on a cross-action. It appears that following the entry of the California judgment a motion to open the default on the ground that the cross-complaint had not in fact been served upon the plaintiff's attorney was denied. This court held that it

was proper for the Texas courts in the subsequent action on the judgment to inquire into the further question of the validity of the service on the attorney, whether that question was one of fact or law, *because that question had not been litigated in the California suit.*

In *Adam v. Saenger*, supra, at page 62 of 303 U.S., pages 651, 652 of 82 L. ed., this Court said:

> "By Rev. Stat. § 905, 28 U. S. C. A. § 687, enacted under authority of the full faith and credit clause, Art. 4, § 1 of the Constitution, the duly attested record of the judgment of a state is entitled to such faith and credit in every court within the United States as it has by law or usage in the state from which it is taken. If it appears on its face to be a record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence, or by the record itself. Hanley v. Donoghue, 116 U. S. 1, 29 L. ed. 535, 6 S. Ct. 242; Knowles v. Logansport Gaslight & Coke Co., 19 Wall. 58, 22 L. ed. 70; Settlemier v. Sullivan, 97 U. S. 444, 24 L. ed. 1110. But in a suit upon the judgment of another state the jurisdiction of the court which rendered it is open to judicial inquiry. Chicago L. Ins. Co. v. Cherry, 244 U. S. 25, 61 L. ed. 966, 37 S. Ct. 492, and *when the matter of fact or law on which jurisdiction depends was not litigated in the original suit* it is a matter to be adjudicated in the suit founded upon the judgment. Thompson v. Whitman, 18 Wall. 457, 21 L. ed. 897. Here the fact of the service of the complaint upon the attorney is alleged by the petitioner and admitted by the demurrer, but the court's conclusion that the California court was without jurisdiction, resting in part upon its construction of the California statutes, presents an issue not litigated in the California suit which must be determined in the present one." [Emphasis added.]

Milliken v. Meyer, 1940, 311 U. S. 457, 85 L. ed. 278, 61 S. Ct. 339, presents another default situation in which it is recognized that an independent determination of jurisdiction of the original court is proper, although in Milliken it was held that there was personal jurisdiction obtained in the first instance.

In Milliken a default judgment against a defendant was entered in Wyoming, based upon extra-territorial service of process, served pursuant to Wyoming statutes regarding substituted service upon those domiciled within the state. Subsequently the defaulting defendant brought an action in Colorado in which he attacked the Wyoming judgment for want of jurisdiction of his person. The Milliken decision does not touch upon the principle urged by petitioners herein. The jurisdictional question determined by the Colorado trial court and by this Court had not been litigated in the earlier Wyoming case, and therefore the independent determination was proper.

Western Union Telegraph Co. v. Pennsylvania, 1961, 368 U. S. 71, 7 L. ed. 2d 139, 82 S. Ct. 199, in no way supports a conclusion that the Nebraska Supreme Court's judgment is not entitled to full faith and credit herein. In the first place the Western Union case did not involve an attempt to redetermine issues previously litigated. It came to this Court by direct appeal from the judgment of the Supreme Court of Pennsylvania. Secondly, the opinion itself, instead of supporting the decision under review, serves to point up its fundamental error.

Western Union, a New York corporation with principal place of business in that state and offices in all others and throughout the world, held a substantial

amount of undisbursed money arising out of money orders bought in Pennsylvania offices to be transmitted to payees chiefly in other states, including New York. As against the company's objection that Pennsylvania had no right to ownership of these intangibles the trial court in Pennsylvania declared that the unclaimed obligations escheated to the state. The Supreme Court of Pennsylvania affirmed, 400 Pa. 337, 162 A. 2d 617. On appeal this Court reversed, holding (1) that the Pennsylvania escheat judgment violated due process because Pennsylvania had no power to protect the company from other claims including the claim of New York, that these obligations were subject to escheat under their laws and (2) that the proper forum to settle controversies between the different states over the right to escheat intangibles was the Supreme Court of the United States.

The basis for the judgment in the Western Union case was the fact that the other claimants were not parties to the action and could not be made parties and therefore their claims could not be cut off in the Pennsylvania litigation. In the absence of power of the Pennsylvania courts to protect Western Union from these other claims, the Pennsylvania judgment denied due process to Western Union; hence the reversal on direct appeal from the judgment of the Supreme Court of Pennsylvania.

In Western Union this Court does not suggest that as between Western Union and Pennsylvania the Pennsylvania judgment if permitted to stand would not be entitled to full faith and credit in other states. This Court merely accorded Western Union protection under the due process clause against subsequent claims of those who were not parties to the Pennsylvania action and who

therefore would not be bound by the Pennsylvania judgment either on the question of subject-matter jurisdiction or the merits of the case.

We turn to cases which affirmatively support the rule that full faith and credit, like res judicata, applies to jurisdictional questions actually litigated between the parties in the first action.

Chicago Life Insurance Co. v. Cherry, 1917, 244 U. S. 25, 61 L. ed. 966, 37 S. Ct. 492, was an Illinois suit on a Tennessee judgment against certain insurance companies. The defense was that the defendant companies had not been validly served with process in Tennessee and that the Tennessee judgment was void. The plaintiff showed in reply that this defense was urged in Tennessee by pleas in abatement, that the decision was for the plaintiff and that the judgment was affirmed in the higher courts of Tennessee. A judgment for plaintiff in the Illinois action was affirmed by the Appellate Court of Illinois and certiorari was denied by the Supreme Court of that state. In this Court the insurance companies urged that the Illinois judgment deprived them of their property without due process of law. This Court held that the Illinois judgment did not take the insurance companies' property without due process of law for the Illinois judgment rested upon the view (right or wrong) that the issue of jurisdiction over the parties was raised and adjudicated after full hearing in Tennessee. This Court also pointed out that if the Tennessee judgment had been declared void in Illinois it might have been called upon to decide whether such judgment had been given

due faith and credit, but that the decision upholding it did not require further Supreme Court attention.

In the Chicago Life Insurance Co. case this Court said, at page 30 of 244 U. S., pages 969, 970 of 61 L. ed.:

> "• • • That a party that has taken the question of jurisdiction to a higher court is bound by its decision was held in Forsyth v. Hammond, 166 U. S. 506, 517, 41 L. ed. 1095, 1099, 17 Sup. Ct. Rep. 665. It can be no otherwise when a court so decides as to proceedings in another state. It may be mistaken upon what to it is matter of fact, the law of the other state. But a mere mistake of that kind is not a denial of due process of law. • • • If the Tennessee judgment had been declared void in Illinois, this court might have been called upon to decide whether it had been given due faith and credit. National Exch. Bank v. Wiley, 195 U. S. 257, 49 L. ed. 184, 25 Sup. Ct. Rep. 70. But a decision upholding it upon the ground taken in the present case does not require us to review the Tennessee decision or to go further than we have gone."

In *Davis v. Davis*, 1938, 305 U. S. 32, 83 L. ed. 26, 59 S. Ct. 3, petitioner had obtained a decree in the District of Columbia granting him a divorce a mensa et thoro. Subsequently petitioner obtained an absolute divorce in Virginia. In the Virginia suit process was served personally upon respondent in the District of Columbia and respondent challenged the jurisdiction of the Virginia court on the ground that neither party had maintained a residence in Virginia for the required period prior to commencement of the suit, that the residence petitioner attempted to establish was for the sole purpose of creating jurisdiction of the court to hear the divorce suit, was a fraud on the court and was not "residence" in

contemplation of law. The Virginia court held that petitioner had maintained a residence in Virginia for the requisite time and that the court had jurisdiction of the subject matter and of the parties.

A subsequent application in the District of Columbia case for modification of the alimony provisions of the decree of divorce a mensa et thoro was denied and the Court of Appeals affirmed that determination. This Court reversed, and held that the determination of the Virginia court regarding subject matter jurisdiction was conclusive and was entitled to full faith and credit.

In the Davis case at pages 39, 40 of 305 U. S. and pages 29, 30 of 83 L. ed., it is said:

> "Art. 4, § 1, requires that judicial proceedings in each state shall be given full faith and credit in the courts of every other state. The Act of May 26, 1790, 1 Stat. at L. 122, Chap. 11, as amended, Rev. Stat. § 905, 28 U. S. C. A. § 687, declares that judicial proceedings authenticated as there provided shall have such faith and credit given to them in every 'court within the United States as they have by law or usage in the courts of the State from which they are taken'. Thus Congress rightly interpreted the clause to mean not some but full credit. Haddock v. Haddock, supra (201 U. S. 567, 50 L. ed. 868, 26 S. Ct. 525, 5 Ann. Cas. 1). The Act extended the rule of the Constitution to all courts, Federal as well as State. Mills v. Duryee, 7 Cranch, 481, 485, 3 L. ed. 411, 413.
>
> "As to petitioner's domicile for divorce and his standing to invoke jurisdiction of the Virginia Court, its finding that he was a bona fide resident of that State for the required time is binding upon respondent in the courts of the District. She may not say that he was not entitled to sue for divorce in the

state court, for she appeared there and by plea put in issue his allegation as to domicile, introduced evidence to show it false, took exceptions to the commissioner's report and sought to have the court sustain them and uphold her plea. Plainly, the determination of the decree upon that point is effective for all purposes in this litigation. Baldwin v. Iowa State Traveling Men's Asso., 283 U. S. 522, 525, 526, 75 L. ed. 1244, 1246, 1247, 51 S. Ct. 517."

Williams v. North Carolina, 1945, 325 U. S. 226, 89 L. ed. 1577, 65 S. Ct. 1092, involved an attack on a Nevada divorce decree by North Carolina in a prosecution for bigamous cohabitation. This Court declined to apply the rule applicable herein to North Carolina because it had not been a party to the Nevada suit, but the Court nevertheless reiterated that rule as follows, l. c. 325 U. S. 230, 89 L. ed. 1582:

"It is one thing to reopen an issue that has been settled, after appropriate opportunity to present their contentions has been afforded to all who had an interest in its adjudication. This applies also to jurisdictional questions. After a contest these cannot be relitigated as between the parties. Forsyth v. Hammond, 166 U. S. 506, 517, 41 L. ed. 1095, 1099, 17 S. Ct. 665; Chicago L. Ins. Co. v. Cherry, 244 U. S. 25, 30, 61 L. ed. 966, 969, 37 S. Ct. 492; Davis v. Davis, supra."

Forsyth v. Hammond, supra, is cited in the Williams case in support of the above quoted portion of the opinion. The Forsyth case, as well as *Stoll v. Gottlieb,* supra, fully support the principle applicable to the present discussion. Strictly speaking they involve res judicata rather than full faith and credit for in those cases the second action was brought in the same state as the first but in the local federal court rather than in the state court in which the first action was maintained. These cases

have been treated in some detail in our argument directed to res judicata.

In *Sherrer v. Sherrer*, 1948, 334 U. S. 343, 92 L. ed. 1429, 68 S. Ct. 1087, it was held that where a husband personally appeared and participated in a contested divorce proceeding in Florida and in that litigation it was determined that the wife had acquired bona fide residence in Florida and a divorce was granted, the Florida judgment was res judicata, and entitled to full faith and credit in Massachusetts wherein both parties had originally resided and to which state the wife subsequently returned. In the opinion it is said, l. c., 334 U. S. 348-350, 92 L. ed. 1434-1436:

> "It is clear that respondent was afforded his day in court with respect to every issue involved in the litigation, including the jurisdictional issue of petitioner's domicile. Under such circumstances, there is nothing in the concept of due process which demands that a defendant be afforded a second opportunity to litigate the existence of jurisdictional facts. Chicago L. Ins. Co. v. Cherry, 244 U. S. 25, 61 L. ed. 966, 37 S. Ct. 492 (1917); Baldwin v. Iowa State Traveling Men's Asso., 283 U. S. 522, 75 L. ed. 1244, 51 S. Ct. 517 (1931).
>
> * * *
>
> "* * * Insofar as cases originating in the federal courts are concerned, the rule has evolved that the doctrine of *res judicata* applies to adjudications relating either to jurisdiction of the person or of the subject matter where such adjudications have been made in proceedings in which those questions were in issue and in which the parties were given full opportunity to litigate. * * *
>
> "This Court has also held that the doctrine of *res judicata* must be applied to questions of juris-

diction in cases arising in state courts involving the application of the full faith and credit clause where, under the law of the state in which the original judgment was rendered, such adjudications are not susceptible to collateral attack."

We submit that enough has been said to demonstrate that the effect of an actual litigation in one court of the question of jurisdiction either of the person or of the subject matter, in a subsequent action between the parties in another court is the same whether the issue is simply one of res judicata or whether the question of full faith and credit arises. In either instance the first judgment is conclusive on jurisdictional questions if the parties have had their day in court and have fully litigated the jurisdictional issues.

Law Review Articles

Our attention has recently been called to two law review comments concerning the Court of Appeals' decision in the instant case. One of these comments appears in 11 Kansas Law Review, page 544 (May, 1963, No. 4). The other is in 111 Pennsylvania Law Review, page 1218 (June, 1963, No. 8).

While the law review articles do not approach the case in precisely the same manner both are well written and interesting to read. They have one thing in common, that is, disagreement with the opinion of the Court of Appeals.

Rather than to epitomize or quote from these articles in our brief in chief, we have determined to have them printed in toto as an appendix hereto, with the thought in mind of furnishing to the Court in convenient form the views of these disinterested observers. The Kansas ar-

ticle appears at page 51, infra, and the Pennsylvania article at page 64, infra.

CONCLUSION

Under the doctrine of res judicata the issue of jurisdiction of the subject matter of the controversy between petitioners and respondent was conclusively established by the decision and judgment of the Nebraska Supreme Court in *Durfee v. Keiffer*, 168 Neb. 272, 95 N. W. 2d 618 (R. 17-29). That judgment, based on a determination of a fact issue fully litigated between the parties in the District Court of Richardson County, Nebraska and again on trial de novo on an appeal taken by respondent herself to the Nebraska Supreme Court, may not be attacked collaterally in Nebraska courts, state or federal. Likewise it may not be attacked in the courts of other states and is entitled to full faith and credit therein. Under the Constitution (Const. U. S. Article IV, Sec. 1, U. S. C. A. Const. Article IV, Sec. 1) as implemented by Act of Congress (Act June 25, 1948, c. 646, 62 Stat. 947, 28 U. S. C. A. Sec. 1738) the collateral attack attempted in Missouri in the present case must fail.

Any supposed policy against a court allegedly acting beyond its jurisdiction has no force and cannot outweigh the policy of conclusiveness of an adjudication as reflected in the res judicata doctrine, under the circumstances of this case. The issue determined in Nebraska was one of fact concerning whether this border-line land remained in Nebraska where it was admittedly located to start with, or whether it shifted by accretion to Missouri. Nebraska courts are as competent to decide this issue as are Missouri courts.

No court is infallible when determining disputed fact questions. But if one assumes that the Nebraska Supreme Court erroneously determined the issue involved herein and thereby took respondent's land without due process of law, respondent's remedy was review in this Court of the judgment of the Nebraska Supreme Court whose jurisdiction respondent invoked. No such review was sought. No doubt respondent, who is represented by eminent counsel, would have petitioned this Court for certiorari if it had been even surmised that the Nebraska court acted arbitrarily and thereby deprived respondent of property without due process of law.

We submit that Judge Duncan correctly applied res judicata and refused to permit this attempted collateral attack, and that the Court of Appeals erroneously held otherwise and refused full faith and credit to the Nebraska judgment. Petitioners respectfully pray that the judgment of the Court of Appeals be reversed and the cause remanded with directions to affirm the judgment of the district court holding that the Nebraska judgment is res judicata and is conclusive in this case.

Respectfully submitted,

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PROOF OF SERVICE

I, Harold W. Kauffman, one of the attorneys for petitioners herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on August 16, 1963, I served copies of the foregoing Brief of Petitioners upon respondent by depositing the same in a United States mailbox with first class postage prepaid; addressed to Robert A. Brown, Tootle-Enright Bank Building, St. Joseph 2, Missouri, such being the post office address of said counsel of record for respondent.

Harold W. Kauffman

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APPENDIX

11 KANSAS LAW REVIEW (Pages 544-551, inclusive)

(May 1963, Number 4)

THE APPLICABILITY OF RES JUDICATA TO DETERMINATIONS OF 'SUBJECT MATTER' JURISDICTION IN CONFLICT OF LAW CASES

Introduction

A problem long troubling judges and lawyers engaged in interstate litigation is the propriety of collateral attack upon jurisdictional issues decided in the forum of a sister state or in a federal court. Immediately, questions concerning the applicability of full faith and credit and the doctrine of res judicata to "subject matter" jurisdiction are raised. Presenting the issue under analysis far better than any hypothetical contrivance, is the recent case of *Duke v. Durfee*.[1]

Duke v. Durfee

A title to land lying in the Missouri River bottom was derived by Julia Duke, a resident of Missouri, from a swamp land patent issued by the State of Missouri. The State of Nebraska, through a tax foreclosure sale and sheriff's deed, issued a title to the same property to Gene Durfee, a Nebraska resident. The reason for the dual claim to ownership hinged upon a factual question concerning the method of course changes made by the river. If the river had changed its course by accretion, the boundary moved with the river and the land was in Missouri. If, on the other hand, the river had changed its course by avulsion, the boundary did not change and the land remained in Nebraska. Durfee brought a quiet title action in Nebraska and Duke, personally served, appeared and litigated all questions including jurisdictional issues.

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1. 308 F. 2d 209 (8th Cir. 1962).

The Nebraska trial court held that the land was in Nebraska, and therefore, the court had jurisdiction to render the judgment. Title was quieted in Durfee and the decision was affirmed on appeal in Nebraska. Following the unsuccessful defense of the Nebraska proceedings, Duke went home to Missouri and, in the courts of that state, began an action to quiet title in himself. Defendant, Durfee, removed to the Federal District Court. In the federal court action, the trial judge held that the land was in Missouri, but that he was bound by Nebraska's findings of jurisdictional facts on the basis of res judicata. Duke then perfected the instant appeal to the Eighth Circuit Court of Appeals where that court *held*, that the jurisdictional issue was not closed by res judicata and the judgment could be collaterally attacked.[2]

Full Faith and Credit and Res Judicata

"Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[3] The foregoing provision of the Constitution of the United States, together with the implementing statute which provides that such acts, records and proceedings are to have the "same full faith and credit in every court . . . as they have by law or usage in the courts . . . from which they are taken,"[4] gives rise to the American concept of a "national jurisprudence." An early exception to the full faith and credit provision was made in *Thompson v. Whitman*.[5] In this landmark decision, the court concluded that the framers of the Constitution did not intend that faith and credit be given to decisions of sister states where the court rendering the judgment lacked jurisdiction. Further, while the records of state courts are often granted verity within that particular state, this concept was held to have "no extra-territorial effect."[6] Therefore, it was made clear that

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2. Ibid.
3. U. S. Const., Art. IV, § 1.
4. 28 U. S. C. § 1738 (1948).
5. 85 U. S. (18 Wall.) 457 (1874).
6. Ibid. See also, Riley v. New York Trust Co., 315 U. S. 343 (1942).

inquiry could be had into the jurisdiction of the first forum, regardless of recitations of jurisdiction in the judgment record, before full faith and credit was required.

While it was established that there could be inquiry into the jurisdiction of the first forum, until the *Baldwin*[7] case the criteria by which the second forum was to determine the validity of the first forum's judgment were uncertain.[8] The *Baldwin* case set the matter at rest at least insofar as jurisdiction over the person was concerned. The court stated:

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why the doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."[9]

Thus, "the political question of jurisdiction was to be determined by the policy behind the doctrine of res judicata."[10]

A factor affecting whether or not res judicata is to be applied to the judgment of the first forum concerning the existence of jurisdiction is the extent of the participation, in the first action, of the party seeking to attack the judgment in the second forum. More explicitly, did the judgment go by default, were the merits litigated without reference to the jurisdictional question, or was the question of the court's jurisdiction actively litigated? The Supreme Court has applied the doctrine of res judicata in

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7. Baldwin v. Iowa State Traveling Men's Ass'n, 283 U. S. 522 (1931).
8. Note, 40 Colum. L. Rev. 523 (1940); Gavit, Jurisdiction of the Subject Matter and Res Judicata, 80 U. Pa. L. Rev. 386 (1932).
9. Baldwin v. Iowa State Traveling Men's Ass'n, supra, note 7, at 525-26.
10. Colum. L. Rev., supra note 8, at 524.

the federal courts to cases where the issue involved was not litigated, but merely could have been.[11] Despite suggestions to the contrary,[12] however, this phase of the doctrine has not been applied to jurisdictional issues in the conflict of laws area.[13] It seems highly unlikely that the doctrine will be extended in the future to conflict cases where the issue of jurisdiction was not litigated in the first forum since such an aplication would abridge the second forum's right to make inquiry into the jurisdictional question, a right which has been held to be "beyond question."[14]

A further and more tenuous distinction in the application of res judicata has traditionally been made between matters of jurisdiction of the person and jurisdiction of the subject matter. This distinction seems basically to stem from the concept that jurisdiction over the person can be conferred by consent,[15] while the converse result controls in regard to subject matter jurisdiction.[16] Further complicating the issue is the varying use of, and the policy considerations which have become attached to, the term "subject matter." "Subject matter" has been used in the conflict of laws area by the Supreme Court to include the problems of the competency of the court rendering the decision as measured by its own laws and constitution;[17] the domicile of a marriage;[18] whether or not a constitutional provision has pre-empted the field from the state courts;[19] the seizure and possession of a res in a proceeding in rem;[20] and the situs of the res of an orel trust,[21] to name a few.

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11. Chicot County Drainage Dist. v. Baxter State Bank, 308 U. S. 371 (1940).
12. Note, 53 Harv. L. Rev. 652 (1940).
13. Colum. L. Rev., supra note 8.
14. Trienies v. Sunshine Mining Co., 308 U. S. 66, 78 (1939).
15. Baldwin v. Iowa State Traveling Men's Ass'n, supra note 7; Chicago Life Ins. Co. v. Cherry, 244 U. S. 25 (1917).
16. Grubb v. Public Util. Comm'n of Ohio, 281 U. S. 470, 475 (1930).
17. Thompson v. Whitman, 85 U. S. (18 Wall.) 457 (1874).
18. Davis v. Davis, 305 U. S. 32 (1938).
19. Grubb v. Public Util. Comm'n of Ohio, supra note 16.
20. Pennoyer v. Neff, 95 U. S. 714 (1878).
21. Treinies v. Sunshine Mining Co., supra note 14.

Influence of Policy

Policy considerations involved in applying res judicata to determinations of "subject matter" jurisdiction are plentiful. Basically, they range from the state's interest that there be an end to litigation to the state's interest in retaining jurisdiction over certain controversies.[22] Both points are touched upon in *Stoll v. Gottlieb*,[23] where the court held that res judicata applied to a federal bankruptcy court's "subject matter" determination of its power to grant a surety's release in reorganization. The court said:

> "We see no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation. . . . Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first."[24]

On the other hand, speaking of policy considerations in other situations, the Court by way of dictum commented:

> "To appraise the cases dealing with status and transfer of title to real estate seems outside the scope of the present inquiry. The rule applied here may or may not be applicable in instances where the courts with jurisdiction of the later controversy are passing

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22. Colum. L. Rev., supra note 8.
23. 305 U. S. 165 (1938).
24. Id. at 172.

upon matters of status and real estate titles. It is frequently said that there are certain strictly jurisdictional facts, the existence of which is essential to the validity of proceedings and the absence of which renders the act of the court a nullity. . . . For instance, service of process in a common law action within a state, publication of notice in strict form in proceedings *in rem* against absent defendants, the appointment of an administrator for a living person, a court martial of a civilian. Upon the other hand there are quasi-jurisdictional facts, diversity of citizenship, majority of litigants, and jurisdiction of parties, a mere finding of which, regardless of actual existence, is sufficient. As to the first group it is said an adjudication may be collaterally attacked, as to the second it may not. We do not review these cases as we base our conclusion here on the fact that in an actual controversy the question of the jurisdiction over the subject matter was raised and determined adversely to the respondent. That determination is *res judicata* of that issue in this action, whether or not power to deal with the particular subject matter was strictly or quasi-jurisdictional."[25]

The doubt cast by the *Stoll* dictum remains unresolved concerning cases where the policy of the enforcing forum might be said to override the policy of res judicata and justify a denial of full faith and credit even where the jurisdictional issue was actively litigated in the first instance.[26] It should be noted at this point, however, that at least two cases with rather strong policy overtones have been held to fall under the doctrine of res judicata, policy considerations notwithstanding.[27] In the first of these two cases, Mississippi was required to enforce a gambling contract drawn in Mississippi for the reason that a Missouri court had held, erroneously, that the contract was legal in Mississippi. Notwithstanding the en-

25. Id. at 176-77.
26. Ibid.
27. Roche v. McDonald, 275 U. S. 449 (1928); Fauntleroy v. Lum, 210 U. S. 230 (1908).

forcing forum's interest in prohibiting gambling, the Missouri decision was one to which full faith and credit was owing.[28] In the second case, Washington was required to enforce one of its own judgments, on which the Washington statute of limitations had run, because Oregon had applied to it another statute when the judgment was sued upon in Oregon.[29] However, neither of these cases applied res judicata to jurisdictional issues.

Another form of policy consideration is raised by three "subject matter" cases where the res judicata concept came into conflict with the supreme law of the land. The first of these three cases involved the conclusiveness of a judgment of a bankruptcy court wherein an insurance company was adjudged an involuntary bankrupt contrary to the express terms of the federal statute which excepted insurance companies from its provisions.[30] No appeal was taken. Reviewing a subsequent action by the company to revise the judgment, the Supreme Court held that the doctrine of res judicata did not apply. The high court indicated that the policy of Congress, as announced by the statute, was stronger than res judicata and the collateral attack was permitted.[31] The second case to deal with this problem began with a federal court action brought by the United States on behalf of certain Indian tribes to recover rent from a bankrupt.[32] In its answer, the bankrupt filed a cross-claim for affirmative relief to recover a claim it had against the Indian tribes. The trial court granted a money judgment in favor of the bankrupt and against the United States on the cross-claim. Completely ignoring this judgment, from which

28. Fauntleroy v. Lum, supra note 27.
29. Roche v. McDonald, supra note 27.
30. Vallely v. Northern Fire Ins. Co., 254 U. S. 348 (1920).
31. It should be noted that while the Court's language justifies the interpretation given here, that res judicata cannot prevail when it conflicts with the supreme law, the Court in Stoll v. Gottlieb, 305 U. S. 165, 175-76, limited the reach of the decision by commenting that the actual basis for the decision in the Vallely case was that the jurisdictional issue was not litigated in the first forum.
32. United States v. United States Fid. & Guar. Co., 309 U. S. 506 (1940).

no appeal was taken, the United States filed a subsequent action on the same facts to recover against the bankrupt's surety, this time in a state court. The earlier judgment was set up by the surety as a defense, but the Supreme Court on appeal held that the doctrine of res judicata could not overcome sovereign immunity. Inasmuch as Congress had not consented to the recovery, the first suit against the bankrupt was not res judicata in the subsequent action against the surety. The third case, again involving bankruptcy, was *Kalb v. Feuerstein*.[33] In that case a farmer began an action in federal court to gain composition and an extension of time in which to pay his debts under the Frazier-Lemke Act. While this action was pending, a mortgagee foreclosed on the farmer's property in the state courts. The Supreme Court, in passing on the issue of whether or not the state court's judgment was res judicata and as such entitled to full faith and credit in the federal court action, said:

> "It is generally true that a judgment by a court of competent jurisdiction bears a presumption of regularity and is not thereafter subject to collateral attack. But Congress, because its power over the subject of bankruptcy is plenary, may by specific bankruptcy legislation create an exception to that principle and render judicial acts taken with respect to the person or property of a debtor whom the bankruptcy law protects nullities and vulnerable collaterally.[34]

It may be significant to note that in none of these cases was the question of jurisdiction actually litigated in the first forum. Judging from the Court's language, however, it may very well be that doctrines of federal pre-emption and sovereign immunity will control over res judicata in subsequent cases where the issue is actually litigated in the first forum.

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33. 308 U. S. 433 (1940).
34. Kalb v. Feuerstein, 308 U. S. 433, 438-39 (1940).

Res Judicata Applied to "Subject Matter" Jurisdiction

A case which seems to be authority for the proposition that "subject matter" jurisdiction, once litigated, is governed by res judicata in a conflict of laws situation is *Trienies v. Sunshine Mining Co.*[35] The case is strong because of its factual intricacies which result in the second forum deciding the jurisdiction question for the first forum, perhaps erroneously, and upon that second judgment, the first forum was held estopped, in an attempted third action, to alter the second forum's decree on the basis of res judicata. The language of *Trienies* is broad, "Even where the decision against the validity of the original judgment is erroneous, it is a valid exercise of judicial power by the second court. One trial of an issue is enough. The principles of res judicata apply to questions of jurisdiction as well as to other issues, as well to jurisdiction of the subject matter as of the parties."[36] Despite this language, and evidently relying upon the limiting dictum in *Stoll v. Gottlieb*,[37] the court in the recent *Duke v. Durfee* case does not apply res judicata.

While there are many policy factors involved in the matter of divorce which might be said to constitute it *sui generis*, it has been clear since *Davis v. Davis*[38] that the "subject matter" question of the legal residence of one of the parties, and hence the situs of the res of the marriage, once actively litigated is res judicata and no longer subject to collateral attack in the conflict situation. By comparison it would seem that the situs of the res of a marriage[39] and the situs of the res of an oral trust[40] have been placed in the same class by the Court when making the policy determination as to whether or not collateral attack is to be allowed.

A hidden factor which seems to underlie the *Stoll* dictum[41] and the decision in the *Duke* case is reflected in the

35. Supra note 14.
36. Id, at 78.
37. Stoll v. Gottlieb, 305 U. S. 165, 176-77 (1938).
38. Supra note 18.
39. Ibid.
40. Trienies v. Sunshine Mining Co., supra note 14.
41. Stoll v. Gottlieb, 305 U. S. 165, 176-77 (1938).

caveats of both the *Restatement of Conflicts* and the *Restatement of Judgments*.[42] Both of these works declare that jurisdiction of the person, once litigated, is forever concluded to collateral attack.[43] In regard to subject matter jurisdiction, however, both circumvent a definitive rule with a statement that the outcome of a collateral attack will be based upon a balancing of "the policy underlying the doctrine of res judicata" against "the policy against permitting the court to act beyond its jurisdiction."[44] Included in this provision are five factors which the Institute feels should be considered in making a decision as to which of the two stated policies is the weightier in a given situation. These factors, leading to a conclusion that collateral attack is to be permitted are:

(a) the lack of jurisdiction over the subject matter was clear;

(b) the determination as to jurisdiction depended upon a question of law rather than fact;

(c) the court was one of limited and not of general jurisdiction;

(d) the question of jurisdiction was not actually litigated;

(e) the policy against the court's acting beyond its jurisdiction is strong.[45]

The hidden factor then would seem to be a search for "literal" rather than "legal" truth in the area of subject matter jurisdiction. In our system of jurisprudence, facts found by the court or jury are the *true* facts, legally speaking, regardless of what *actually* may have transpired

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42. Restatement, Conflict of Laws, § 451 (Supp. 1948); Restatement, Judgments § 10 (1942).

43. Restatement, Conflict of Laws, § 451(1) (Supp. 1948); Restatement, Judgments, § 9 (1942).

44. Restatement, Conflict of Laws, § 451(2) (Supp. 1948); Restatement, Judgments, § 10 (1942).

45. Ibid.

or what the situation might *actually* have been.[46] With state boundaries becoming less significant each day in legal contemplation, a serious doubt may be cast upon the necessity for excepting jurisdictional facts, once litigated, from our concept of "legal truth."

A New Book

It would therefore appear that the term "subject matter jurisdiction," clouded by its various meanings and the engrafting of subtle policy considerations, has become more of a *shibboleth* than a tool for analysis. Through overgeneralizations, the words specifically mean little if anything. Perhaps then, a new system of analysis is in order for the entire area of jurisdictional problems with particular reference to conflict of laws situations and the application of res judicata through full faith and credit. Such a system might be developed more in terms of the various problems encountered than in terms of which labels, already shrouded with hidden meaning, might be applied. Given the proposition that the question of jurisdiction, be it personal or "subject matter," has been fully litigated in the first forum, the analysis should be in terms of: What is alleged to have been the error in the findings of the first forum? As a matter of policy, should res judicata apply to situations where the court is alleged to have erroneously held it had: (1) competency under its own constitution and statutes to hear and decide the case; (2) a constitutional basis for the exercise of its power over the case (domicile, substantial contact, situs of the res, physical presence, etc.); (3) jurisdiction over persons or things through the exercise of proper process (service of process on persons or attachment of the res in an action in rem, for example); or, (4) jurisdiction to render the judgment in the face of contrary provisions of the supreme law of the land? It is submit-

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46. Res Judicata Facit Ex Albo, Nigrum: Ex Nigro, Album: Ex Curvo, Rectum: Ex Recto, Curvum. A thing adjudged (the solemn judgment of a court) makes white, black; black, white; the crooked, straight; the straight, crooked. Black, Law Dictionary (4th ed. 1951).

ted that the old cases in this area can be fitted into this framework with the same results and yet give a clearer understanding and more certain predictability for future conduct.

Duke Under the Knife

Duke v. Durfee presents the problem of applying res judicata to "subject matter" jurisdiction problems in what might be termed its most emotional or dramatic setting. Involved herein is a piece of real estate (a fact which alone seemed significant to the court) which is situated on or near the boundary line between two states. As might be expected, the court returns to concepts of exercising jurisdiction over property outside the territorial limits of the forum, so poignantly declared void, by dictum, in *Pennoyer*.[47] Again, it seems the court is searching for some form of "actual" truth rather than adhering to time-tested principles of "legal" truth based upon supported findings of fact at the trial court level. Further, the court separates concepts of full faith and credit from the doctrine of res judicata and concludes that there is no issue regarding the former, but merely an application of the latter. This reasoning appears to be erroneous inasmuch as it is through the full faith and credit clause that the doctrine of res judicata finds its place in "national jurisprudence."[48] In reasoning that the doctrine of full faith and credit does not "preclude a second forum's inquiry into questions of the first court's personal or subject-matter jurisdiction,"[49] the court seems to disregard the earlier decisions which conclude that after the inquiry is made, and it has been determined that the issue was litigated in the first forum, the doctrine of res judicata precludes *further* inquiry into the jurisdictional facts and issues.

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47. Pennoyer v. Neff, supra note 20, at 722-23.

48. Riley v. New York Trust Co., 315 U.S. 343, 349 (1942); Rashid, The Full Faith And Credit Clause: Collateral Attack of Jurisdictional Issues, 36 Geo. L. J. 154, 180 (1947-48).

49. Duke v. Durfee, supra note 1, at 212.

The court engages in a chronological discussion of Supreme Court cases involving the question of res judicata and its application to the conflict of laws problem, but no attempt is made to classify the decisions in terms of what actual problems were involved in the cases.

In analyzing the *Duke* case in terms of the tests established by the *Restatement*,[50] the court readily ascertained that the first four of the five tests, indicated by the caveat as significant, were against permitting collateral attack. Only the test concerning the policy of a court acting beyond its jurisdiction was, therefore, given relevance. In terms of policy, however, there would seem to be no serious problem involved in the application of res judicata to this case. The decision in the first forum does not establish the boundary line and is not binding upon the states.[51] Furthermore, by analogy, it is difficult to determine why real estate should be of more importance, policy wise, to the enforcing forum than the situs of the res of an oral trust,[52] or the situs of the res of a marriage.[53] Consistent with precedent, it would also appear that in cases where a party has either voluntarily submitted his controversy to a forum, or appears and fully litigates the question of jurisdiction in an action brought against him, without appealing from an adverse decree, the policy behind upholding the judgment's sanctity and the need for certainty outweigh other considerations.

Conclusion

The foregoing analysis of the decision in the *Duke* case has been based upon contemporary terminology and usages. Should the problem of jurisdiction in conflict of laws areas be reclassified, as hereinbefore suggested, it is submitted that this case would fall into the proposed second category, namely: Did the first forum have a

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50. Restatement, Conflict of Laws, § 451(2) (Supp. 1948).
51. Cf. Land v. Dollar, 330 U. S. 731 (1947); United States v. Lee, 106 U. S. 196 (1882).
52. Trienies v. Sunshine Mining Co., supra note 14.
53. Davis v. Davis, supra note 18.

constitutional basis for exercising jurisdiction over the matter at issue? Where the issue was fully and freely litigated in the first forum, it has already been shown that the court has freely applied the doctrine of res judicata to this constitutional basis category in the area of jurisdiction of the person, jurisdiction over the res of an oral trust, jurisdiction over the res of a marriage, and in the field of "substantial contact" required to give courts jurisdiction over corporations. There appears no reason which would justify an exception for this case to this consistent line of reasoning. The remedy is clearly appeal, if error was committed in the first forum's factual conclusion, not collateral attack.

Certiorari has been granted the *Duke* case by the Supreme Court.[54] It is suggested that a new approach, casting aside meaningless labels, would be in order to better equip the bench and bar for its task of dealing with the complex problems of interstate litigation which daily increase.

TERRY L. BULLOCK

54. Durfee v. Duke, cert. granted, 83 Sup. Ct. 509 (1963).

111 PENNSYLVANIA LAW REVIEW (1218-1226, incl.)
(June 1963, Number 8)

CONFLICT OF LAWS—STATE'S DETERMINATION OF SUBJECT MATTER JURISDICTION OVER BORDER LAND IS OPEN TO COLLATERAL ATTACK IN BORDERING STATE

N brought an action in the Nebraska state courts to quiet title to land situated in the Missouri River bottoms close to the Nebraska-Missouri boundary line.[1] *N*'s title

1. The boundary between Missouri and Nebraska is the middle of the main channel of the Missouri River. Instant case at 210.

was based on a Nebraska tax sale deed. *M*, who had possession of the land and a title derived from a swamp patent issued by Missouri, appeared generally in the action and challenged the court's jurisdiction over the subject matter, alleging that the land was located in Missouri. The trial court found that the land was in Nebraska and quieted title in *N*. After a trial de novo, the Nebraska Supreme Court affirmed.[2] *M* then instituted an action in the Missouri courts to quiet title to the same land. *N* removed this action to the federal district court, which dismissed the action on the ground that the Nebraska judgment was res judicata. The Court of Appeals for the Eighth Circuit reversed, holding that since the Nebraska judgment indirectly affected Missouri's alleged sovereign interest in the land, it was "not unreasonable or improper" for the district court in Missouri to "satisfy itself as to the first forum's subject-matter jurisdiction."[3] *Duke v. Durfee*, 308 F. 2d 209 (8th Cir. 1962), *cert. granted*, 371 U. S. 946 (1963).

Although the Supreme Court at first did not view the full faith and credit clause[4] as barring re-examination by

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2. Durfee v. Keiffer, 168 Neb. 272, 95 N. W. 2d 618 (1959). The issue of jurisdiction was primarily one of fact and was determinative of the controversy. Since the land was originally on the Nebraska side of the river, the court's finding that the land was still in Nebraska automatically determined that N was the rightful owner because his title was based on a Nebraska tax deed. Thus, Missouri, never having had dominion over the land, could not have conveyed any interest to M via its land patent. Id. at 280-81, 95 N. W. 2d at 624-25. The location of the boundary between the two states was set by determining whether the Missouri River had changed its course by the process of avulsion or accretion. When a river suddenly abandons its old course and seeks a new channel (avulsion), there is no change in the boundary; the boundary remains in the middle of the old channel. If, however, a river changes its channel gradually by alluvial formations (accretion), the boundary moves with the river. Nebraska v. Iowa, 143 U. S. 359 (1892).

3. Instant case at 220.

4. "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U. S. Const., Art. IV, § 1. Federal courts must give full faith and credit to state court judgments. 28 U. S. C. § 1738 (1958); Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U. S. 183, 193 (1941) (dictum).

one state of another state's jurisdictional determinations,[5] the practical need for an end to litigation of the same parties[6] has induced the Court to make local principles of res judicata, even as to jurisdictional issues, "a part of [our] national jurisprudence.'" The considerations against allowing a foreign forum's allegedly erroneous jurisdictional determination to stand must now be bal-

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5. If it was determined that the first forum did not have jurisdiction, the judgment was considered a nullity. The leading case is Thompson v. Whitman, 85 U. S. (18 Wall.) 457 (1874); there the Court, quoting Chancellor Kent, declared:

> "[I]n all instances the jurisdiction of the court rendering the judgment may be inquired into . . . . It is only when the jurisdiction of the court in another State is not impeached, either as to the subject-matter or the person, that the record of the judgment is entitled to full faith and credit. The court must have had jurisdiction not only of the cause, but of the parties, and in that case the judgment is final and conclusive."

Id. at 468.

See Bell v. Bell, 181 U. S. 175 (1901); D'Arcy v. Ketchum, 52 U. S. (11 How.) 165 (1850). See generally Ehrenzweig, Conflict of Laws, § 57, at 207-09 (1962); Boskey & Braucher, Jurisdiction and Collateral Attack: October Term, 1939, 40 Colum. L. Rev. 1006 (1940); Jackson, Full Faith and Credit—The Lawyer's Clause of the Constitution, 45 Colum. L. Rev. 1 (1945); Rashid, The Full Faith and Credit Clause: Collateral Attack of Jurisdictional Issues, 36 Geo. L. J. 154 (1948).

6. The rationale for the doctrine of res judicata was given in Stoll v. Gottlieb, 305 U. S. 165, 172 (1938):

> Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first.

As to the personal need, see Arnold & James, Cases on Trials, Judgments & Appeals 133-36 (1936).

7. Riley v. New York Trust Co., 315 U. S. 343, 349 (1942). The Court has barred collateral attack in the following cases: Sherrer v. Sherrer, 334 U. S. 343 (1948) (subject matter jurisdiction—full faith and credit); Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381 (1940) (subject matter jurisdiction—res judicata); Treinies v. Sunshine Mining Co., 308 U. S. 66 (1939) (subject matter jurisdiction—full faith and credit); Davis v. Davis, 305 U. S. 32 (1938) (subject matter jurisdiction—full faith and credit); Stoll v. Gottlieb, 305 U. S. 165 (1938) (subject matter jurisdiction—res judicata); American Sur. Co. v. Baldwin, 287 U. S. 156 (1932) (personal jurisdiction—full faith and credit); Baldwin v. Iowa State Traveling Men's Ass'n, 283 U. S. 522 (1931) (personal jurisdiction—res judicata).

anced against the weighty considerations underlying res judicata.[8] Collateral attack will rarely be permitted even when jurisdictional issues were not previously litigated if the parties appeared generally and had full opportunity to raise such issues.[9] But, when important congressional policies are involved, the Court has developed a narrow exception to the rule and allowed inquiry into the first forum's jurisdiction over the subject matter.[10] As yet, however, it has not deemed state policy considerations sufficient to justify a collateral attack on a sister state court's determination of subject matter jurisdiction if that court had jurisdiction over the parties, although it has conceded that there could be such cases.[11]

The court in the present case summarily disposed of the full faith and credit issue, reasoning that a second forum may always inquire into the first forum's jurisdictional determinations and, therefore, that only a ques-

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8. Policy considerations in favor of allowing collateral attack outweighed the policy underlying res judicata in United States v. United States Fid. & Guar. Co., 309 U. S. 506 (1940) (sovereign immunity), and Kalb v. Feuerstein, 308 U. S. 433 (1940) (Congress' plenary power over bankruptcy); see Rashid, supra note 5, at 171-74. Compare Grubb v. Public Util. Comm'n, 281 U. S. 470 (1930) (state and federal concurrent jurisdiction over interstate commerce), and Vallely v. Northern Fire & Marine Ins. Co., 254 U. S. 348 (1920) (Congress' plenary power over bankruptcy), in which strong policy considerations were present and collateral attack was allowed. However, in both cases the Court was still applying the old theory that the jurisdiction of a foreign forum could always be questioned. Neither in Kalb nor in United States Fid. & Guar. Co. were the jurisdictional issues actually litigated in the first forum, but it seems unlikely, in light of the strong policy considerations, that prior litigation of these issues would have led to different results.

9. Chicot County Drainage Dist. v. Baxter State Bank, 308 U. S. 371 (1940); see Rashid, supra note 5, at 165-71. The Chicot principle was reaffirmed in Heiser v. Woodruff, 327 U. S. 726, 735-36 (1946).

10. See note 8 supra. But see Jackson v. Irving Trust Co., 311 U. S. 494 (1941).

11. See Sherrer v. Sherrer, 334 U. S. 343, 355 (1948) (dictum). But cf. Western Union Tel. Co. v. Pennsylvania, 368 U. S. 71 (1961); Riley v. New York Trust Co., 315 U. S. 343 (1942). In Chicago Life Ins. Co. v. Cherry, 244 U. S. 25, 30 (1917), Mr. Justice Holmes stated that if a forum's determination as to jurisdiction is so gross a mistake "as to be impossible in a rational administration of justice," other forums need not give the judgment full faith and credit.

tion of federal res judicata law was posed.[12] Not only does this decision appear incorrect,[13] but it may have been unnecessary, for either of two reasons. If, as the court seems to have assumed,[14] the case was merely a diversity action in a federal court, the court should first have looked to the law of Missouri to ascertain if that state would give effect to the Nebraska judgment without the compulsion of the full faith and credit clause.[15] Although there is no Missouri law precisely on point, the Missouri Supreme Court has held that once an issue of personal jurisdiction over a Missouri corporation has been litigated in a sister state, it cannot be relitigated in the Missouri courts.[16]

However, the present case is not merely a diversity action. The location of an interstate boundary and the adjudication of disputes between parties claiming land under conflicting grants from different states are matters

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12. Instant case at 212.

13. See text accompanying notes 4-11, supra.

14. See instant case at 212, where the court declares:
Thus, there is no full faith and credit requirement that, in the case before us, a Missouri court—and thereby the federal district court in Missouri, see Angel v. Bullington, [330 U.S. 183 (1947)] . . . — must accept the Nebraska judgment as final.

15. See Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941); Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

16. Hall v. Wilder Mfg. Co., 316 Mo. 812, 293 S.W. 760 (1927) (alternative holding). The case involved a New York court's determination that it had personal jurisdiction over a Missouri corporation which had specially appeared to contest jurisdiction. In barring collateral attack in the Missouri courts, the Missouri Supreme Court alternatively relied on the full faith and credit clause and on Missouri res judicata law. Undoubtedly Missouri's sovereign interest in the property involved in the present case is stronger than any interest it had in protecting the Missouri corporation in Hall. Nevertheless a federal court applying state law in a diversity suit is more restricted in its application of that law than the state supreme court, and thus, if it were presented with the factual situation in the instant case, it would probably regard the Hall case as highly persuasive authority and therefore not reach the constitutional issue.

If there is no state law on the issue of collateral attack, the Supreme Court has indicated that it is appropriate to follow the federal res judicata law. Treinies v. Sunshine Mining Co., 308 U.S. 66, 78 n. 26 (1939).

of federal concern.[17] Since it would be inappropriate to apply one state's law in preference to that of the other, federal common law, not state law, should provide the rules for decision,[18] both as to the principal substantive issue and to ancillary matters, such as res judicata.[19] On

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17. In Cissna v. Tennessee, 246 U. S. 289 (1918), the state sought to enjoin Cissna, a private party, from removing timber from certain lands which were originally part of the Mississippi River bed. Cissna challenged the Tennessee court's jurisdiction on the ground that the land was in Arkansas. The court found the land to be in Tennessee and gave judgment for the state. The Tennessee Supreme Court affirmed. In reversing, the United States Supreme Court declard that a correct application of the law of interstate boundaries was necessary "in order that proper effect . . . be given to the treaties and acts of Congress by which [the Mississippi River] . . . was established as an interstate boundary, and hence this is a question of federal law." Id. at 296. It concluded that the Tennessee court had wrongly applied the boundary law.

18. Cf. United States v. Standard Oil Co., 332 U. S. 301, (1947); Clearfield Trust Co. v. United States, 318 U. S. 363 (1943); Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U. S. 92 (1938). It should be noted that the Constitution provides that "the judicial Power shall extend . . . to Controversies . . . between Citizens of the same State claiming Lands under the Grants of different States . . . ." U. S. Const., Art. III, § 2. Hamilton's comments on this provision indicate more than a concern for an impartial tribunal but, in addition, a concern for an impartial law:

> The reasonableness of the agency of the national courts in cases in which the State tribunals cannot be supposed to be impartial, speaks for itself. No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias. This principle has no inconsiderable weight in designating the federal courts as the proper tribunals for the determination of controversies between different states and their citizens. And it ought to have the same operation in regard to some cases between citizens of the same State. Claims to land under grants of different States, founded upon adverse pretensions of boundary, are of this description. The courts of neither of the granting States could be expected to be unbiased. The laws may have even prejudged the question, and tied the courts down to decisions in favor of the grants of the State to which they belonged.

The Federalist No. 80, at 115 (Dunne ed. 1901) (Hamilton). (Emphasis added.)

19. Even though federal law provides the rules for decision, diversity was the basis of jurisdiction in the present case. Section 1331 of the Judicial Code provides that "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy . . . arises under the Constitution, laws, or treaties of the United States." 28 U. S. C. § 1331(a) (1958). However, in an action to quiet title, "it is not necessary for the plaintiff to do more than allege his own title and that the defendant claims adversely to him. The nature of the ad-

(Continued on bottom of page 20)

this view of the case, the question of allowing collateral attack on the Nebraska judgment is primarily one of federal res judicata law and only secondarily one of full faith and credit. Stated differently, the federal court in Missouri should first have decided as a matter of federal common law whether it should give res judicata effect to the Nebraska judgment. Only if that issue was resolved in favor of allowing a collateral attack would the court have had to decide whether the federal statute[20] implementing the full faith and credit clause compelled it to give effect to the Nebraska judgment.[21] The court's reliance on federal res judicata law appears, therefore, to have been correct although its reasons for so doing may have been erroneous.

As a problem of res judicata, the present case involves a balancing of the policy considerations in favor of allowing the federal court in Missouri to inquire into the Nebraska court's jurisdictional determination against the almost conclusive policy underlying the finality of judg-

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verse claim, and source and manner from and in which it originated, are immaterial." Marshall v. Desert Properties Co., 103 F. 2d 551, 552 (9th Cir.), cert. denied, 308 U. S. 563 (1939). In the present case, M's claim derives not from a federal treaty, statute, or the Constitution, but merely from a Missouri swamp patent and Missouri property law. It seems unlikely, therefore, that M would have been able to establish district court jurisdiction in her "well-pleaded" complaint. On the "well-pleaded" complaint rule for establishing district court jurisdiction, see Mishkin, The Federal "Question" in the District Courts, 53 Colum. L. Rev. 157, 164, 176-77 (1953).

If M and N had been citizens of the same state claiming under land grants from different states, 28 U. S. C. § 1354 (1958), implementing U. S. Const. Art. III, § 2, would have conferred jurisdiction on the district court in Missouri.

20. 28 U. S. C. § 1738 (1958).

21. Federal courts are not bound by the clause itself, but only by the statute. See Davis v. Davis, 305 U. S. 32, 39-40 (1938).

Admittedly, the analysis of the present case would be basically the same, whether the case is viewed in res judicata or full faith and credit terms. As a matter of judicial process, however, it seems preferable for a court to decide whether it would—as a matter of common law—give effect to a judgment before it decides whether a federal statute compels it to do so.

ments.[22] In striking this balance, Supreme Court decisions, as synthesized by the *Restatement of Conflict of Laws*,[23] have deemed it relevant that

> the lack of jurisdiction over the subject matter was clear; . . . the determination as to jurisdiction depended upon a question of law rather than of fact; . . . the court was one of limited and not of general jurisdiction; . . . the question of jurisdiction was not actually litigated; . . . [and] the policy against the court's acting beyond its jurisdiction is strong.[24]

The Court of Appeals decided that the present case was controlled by the last of these factors—that "the policy against the court's acting beyond its jurisdiction is strong."[25] It indicated that the Nebraska judgment would affect, although only indirectly, Missouri's sovereignty, the validity of its land titles, and its power to tax.[26] Of these interests, the latter two—the validity of Missouri's land titles and its power to tax the disputed land—are merely adjuncts of the first—sovereignty. Concededly, sovereignty over its territory is important to each state, but here neither state has clear dominion over the land in question. As the Supreme Court has said in another context, "this is . . . a case involving inconsistent assertions of power by courts of two States of the Federal Union and thus presents considerations which go beyond the interests of local policy, however vital."[27] If Missouri were to do nothing, its alleged sovereign interest could be impaired by the Nebraska judgment. However, as between the two states, the Nebraska judgment is not determinative of the boundary issue;[28] Missouri can bring

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22. See text accompanying notes 8-11 *supra*.

23. See instant case at 217-18.

24. Restatement, Conflict of Laws § 451(2) (Supp. 1948); accord, Restatement, Judgments § 10 (1942).

25. Instant case at 218-19.

26. Id. at 220.

27. Sherrer v. Sherrer, 334 U. S. 343, 354 (1948).

28. See New York v. Connecticut, 4 U. S. (Dall.) 1 (1799); Fowler v. Lindsey, 3 U. S. (Dall.) 411 (1799); cf. United States v. Lee, 106 U. S. 196 (1882).

an original action in the Supreme Court to determine in which jurisdiction the land is located.[29] Since Missouri has this constitutionally provided procedure to protect its interests, it is difficult to understand why Missouri's interest should avail *M*, who fully litigated the jurisdictional issue in the Nebraska district court, obtained a trial de novo in the Nebraska Supreme Court, and could have sought certiorari in the United States Supreme Court.[30]

The court placed considerable stress on the notion that a state's real property is traditionally immune "from direct disposition by a sister state's judgment,"[31] but failed to explore the reason for the rule. Apart from tradition,[32] this immunity is based on practical considerations which dictate that litigation concerning titles to land generally ought to be held in the jurisdiction where the land is situated: records dealing with the property will be readily available, most witnesses will be living in the same general area, the premises can be viewed easily, employees in the title office if needed to testify at the trial will not be detained for extended periods of time, and the local courts will be familiar with the recording procedure and the state's land title law. In the present case, these considerations as well as the traditional notion of a sovereign's unique "physical power" over the land balance evenly no matter in which state the trial is held

29. See U. S. Const. Art. III, § 2. It must be admitted that such an action in the Supreme Court might prove lengthy and costly. See Note, The Original Jurisdiction of the United States Supreme Court, 11 Stan. L. Rev. 665, 695 (1959). It would, however, determine the boundary not only as to the property involved in the present case but also as to property located down the river. The fact that the shifting of the river may have affected downstream property argues for one determination of the boundary issue which will be binding in all future private party suits.

30. In a petition for certiorari, *M* might have claimed that because of the Nebraska court's alleged lack of subject-matter jurisdiction, her property had been taken without due process.

31. See instant case at 219.

32. See Fall v. Eastin, 215 U. S. 1, 11-12 (1909); Developments in the Law—State-Court Jurisdiction, 73 Harv. L. Rev. 909, 943 (1960).

because it is not clear in which jurisdiction the land lies.

In addition, the present case is distinguishable from the few recent cases in which the Supreme Court has allowed collateral attack on determinations of subject matter jurisdiction. This has only occurred when an important congressional policy would have been thwarted by the earlier decision. In *Kalb v. Feuerstein*,[33] congressional policy with respect to bankruptcy was involved. The Court there stated that

> "Congress, because its power over the subject of bankruptcy is plenary, may by specific bankruptcy legislation . . . render judicial acts taken with respect to the person or property of a debtor whom the bankruptcy law protects nullities and vulnerable collaterally."[34]

In *United States v. United States Fid. & Guar. Co.*,[35] if collateral attack had not been permitted liability would have been imposed on Indian tribes that supposedly had sovereign immunity from suit. In contrast, Missouri's sovereign interest in the present case is neither directly nor conclusively impaired by the Nebraska judgment.[36]

Significantly, the Supreme Court has recently cast considerable doubt on the correctness of earlier dicta that res judicata may not apply to foreign judgments involving status or land titles.[37] Despite the old theory that the domiciliary state was an integral partner in the marriage contract, which could not be rescinded without the state's permission,[38] the Court held in *Sherrer v. Sherrer*[39] that

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33. 308 U. S. 433 (1940).

34. Id. at 438-39.

35. 309 U. S. 506 (1940).

36. See text accompanying notes 28-29, supra.

37. United States v. United States Fid. & Guar. Co., 309 U. S. 506, 514 (1940) (dictum); Stoll v. Gottlieb, 305 U. S. 165, 176 (1938) (dictum).

38. See Note, 1947-48 Term of the Supreme Court: Interstate Status of Divorce, 48 Colum. L. Rev. 1083 (1948), and authorities there cited.

39. 334 U. S. 343 (1948).

if the parties have appeared in a divorce proceeding in a sister state and if there was a determination of the bona fide residency of the spouse seeking the divorce, all states must honor that determination.[40] It thought that the policy underlying res judicata and thereby full faith and credit, outweighed the domiciliary state's interests. "There is nothing in the concept of due process which demands that a defendant be afforded a second opportunity to litigate the existence of jurisdictional facts."[41] *Sherrer* is demonstrative of the Court's tendency to extend the full faith and credit principle. Notwithstanding that a state's interest in its land may be more substantial than its interest in the marital status of its domiciliaries, the present case stands in a better posture for precluding collateral attack, for in *Sherrer* the governmental interest was foreclosed by the out-of-state litigation.

As between the litigants, there is no reason to retry the case in the Missouri federal courts. No assertion was made that the Nebraska courts rendered an unfair judgment. If *M* feared prejudice, she could have removed the action to the federal district courts.[42] The federal court in Missouri can add nothing but another independent conclusion on the question of fact which is determinative of both the jurisdictional issue and the case on its merits: did the Missouri River change its course suddenly or gradually?[43] Consequently, little is gained from the present decision. However, something of value is lost; the decision, in addition to sanctioning repeated trials of a factual issue, leads to confusion and disrespect for the

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40. However, the judgment must be given full faith and credit only if it is not subject to collateral attack in the state that rendered it.

41. Id. at 348.

42. See 28 U.S.C. §§ 1331(a), 1332(a), 1441(a) (1958).

43. See instant case at 211. On the avulsion-accretion distinction, see note 2, supra.

judicial process[44] by creating practical problems as to the binding effect of each judgment. There is some authority that if a second forum erroneously fails to give full faith and credit to a prior jurisdictional determination, the erroneous resolution of the full faith and credit issue will nonetheless be res judicata in a collateral attack on the second judgment,[45] and thus the second decision supersedes the first. But the court's conclusion in the present case that each affected state can make an independent evaluation of the jurisdictional question seems to argue against binding *N* by the Missouri judgment. Under its analysis, if the Missouri trial court should give judgment for *M*, there is no reason why a Nebraska court, in a subsequent collateral attack by *N*, should give that Missouri judgment res judicata effect; if Missouri's sovereign interest was sufficient to warrant reopening the prior jurisdictional determination, so is Nebraska's. Moreover, this analysis would authorize a third state having an interest in the land to make a third determination, which presumably would not supersede the first two. Experience dictates that the practical procedure is appellate review, not collateral attack.

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44. In a similar case; Iselin v. La Coste, 55 F. Supp. 977, 980 (W. D. La. 1944), the district court judge said in a somewhat facetious manner:

> If litigation over the same property can thus be carried on successfully in two federal courts, in different states, contiguous to the river, where the island is claimed to have been formed, it would seem that if it had happened that the location had been in, say, the Red River, adjacent to where three states, Texas, Arkansas and Louisiana, join, it would have been possible for the plaintiffs to invoke the decisions of three separate federal courts on the same chain of title
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> . . . .

He concluded that the prior judgment was res judicata. In affirming, the Fifth Circuit continued in the same facetious vein by saying, "we are, therefore, now confronted with the vagaries of the river as well as the vagaries of counsel for Plaintiffs." Iselin v. La Coste, 147 F. 2d 791, 793 (5th Cir. 1945).

45. See Treinies v. Sunshine Mining Co., 308 U. S. 66 (1939); United States v. 171.74 Acres of Land, 206 F. Supp. 322 (D. Neb. 1962); Restatement, Judgments § 42 (1942); cf. Ambatielos v. Foundation Co., 203 Misc. 470, 116 N. Y. S. 2d 641 (Sup. Ct. 1952) (inconsistent judgments of courts of two foreign countries).